IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-208

EWALD B. NYQUIST, Commissioner of Education of the State of New York, and NEW YORK STATE HIGHER EDUCATION SERVICES CORPORATION,

Appellants,

against

JEAN-MARIE MAUCLET,

Appellee.

EWALD B. NYQUIST, Commissioner of Education of the State of New York, THE UNIVERSITY OF THE STATE OF NEW YORK, THE BOARD OF REGENTS OF THE STATE OF NEW YORK, THE NEW YORK HIGHER EDUCATION ASSISTANCE CORPORATION, WILLARD C. ALLIS, DR. ERNEST BOYER, DR. JUDAH CAHN, WILMOT R. CRAIG, THOMAS P. DENN, WALTER A. KASSENBROCK, NORMA KERSHAW, REV. LAURENCE J. MCGINLEY, S. J., WILLIAM G. MORTON and RUSSEL N. SERVICE, being the members of the board of directors of said corporation, and THE NEW YORK STATE HIGHER EDUCATION SERVICES CORPORATION,

Appellants,

against

ALAN RABINOVITCH,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURTS FOR THE WESTERN AND EASTERN DISTRICTS OF NEW YORK

JURISDICTIONAL STATEMENT

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TABLE OF CONTENTS

TABLE OF CASES

STATUTES CITED

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ON APPEAL FROM THE UNITED STATES DISTRICT COURTS FOR THE WESTERN AND EASTERN DISTRICTS OF NEW YORK

JURISDICTIONAL STATEMENT

. Ewald B. Nyquist, Commissioner of Education of the State of New York, and the above-named public officials and agencies ("appellants") appeal from a judgment of the United States District Court for the Western and Eastern Districts of New York (statutory three-judge court), dated March 26, 1976. The judgment declares New York Education Law § 661(3) invalid under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and permanently enjoins its enforcement. New York Education Law ("NYEL") § 661(3) authorizes state financial aid for any eligible student pursuing a higher education who is a United States citizen, an alien willing to apply for citizenship when capable of doing so or one of a class of refugees with parole status. This Jurisdictional Statement is submitted with a Motion to Dismiss or Affirm in *Rabinovitch* v. *Nyquist,* Doc. No. 75-1809. In that appeal, Alan Rabinovitch, an appellee herein, seeks reversal of the March 26 judgment insofar as it denies him damages equal to the state financial aid he alleges he would have received but for his refusal to apply for United States citizenship.

Opinions Below

The opinion of the single district judge in support of the convening of a three-judge court in *Mauclet* v. *Nyquist,* is not reported. It is reproduced in Appendix A, pp. 1a-3a, to this Jurisdictional Statement.

The opinion of the single district judge in support of the convening of a three-judge court in *Rabinovitch* v. *Nyquist,* is not reported. It is reproduced in Appendix B, pp. 4a-10a.*

* This opinion is also reproduced in Appendix C, pp. 12a-17a, to the Jurisdictional Statement in *Rabinovitch* v. *Nyquist, et al.,* Doc. No. 75-1809.

The opinion of the three-judge district court, dated February 11, 1976, is reported at 406 F. Supp. 1233 (E D & W.D.N.Y.). It is reproduced in Appendix D, pp. 13a-18a.*

Jurisdiction

The jurisdiction of this court is conferred by 28 U.S.C. § 1253.

The judgment of the three-judge district court was filed on March 29, 1976 and is reproduced in Appendix E, pp. 19a-20a.

The Notice of Appeal to this court was filed on May 28, 1976 and is reproduced in Appendix F, p. 21a.

State Statute Involved

New York Education Law § 661, as amended by c. 663, § 1 of the New York Laws of 1975, effective July 1, 1975, states in part:

Eligibility requirements and conditions governing awards and loans

• • •

3. Citizenship. An applicant (a) must be a citizen of the United States, or (b) must have made application to become a citizen, or (c) if not qualified for citizenship, must submit a statement affirming intent to apply for United States citizenship as soon as he has the qualifications, and must apply as soon as eligible for citizenship, or (d) must be an individual of a class of refugees paroled by the attorney general of the

* This opinion is also reproduced in Appendix C, pp. 5a-11a, to the Jurisdictional Statement in *Rabinovitch* v. *Nyquist, et al.,* Doc. No. 75-1809.

United States under his parole authority pertaining to the admission of aliens to the United States.[*]

Questions Presented

1. Should New York Education Law § 661(3) be reviewed under a strict equal protection standard because it excludes some alien students from state aid for higher education?

2. Is the denial of state aid to alien students who refuse naturalization under § 661(3) reasonably or substantially related to New York's interest in distinguishing those students who are the proper objects of its public funds from those who are not and to its interests in expanding its political community and in educating its electorate?

3. Does appellee Rabinovitch have standing to challenge § 661(3) insofar as it limits student loans to citizens and designated classes of aliens although he has not applied for a loan and had he applied, the loan might have been denied without regard to § 661(3).

Statement of the Case

Appellees Mauclet and Rabinovitch are permanent resident aliens (13a).** Appellee Mauclet is a French citizen and a graduate student at the State University of New York at Buffalo (14a). He filed a timely application for $600 tuition assistance for the academic year 1974-1975. NYEL §§ 604(1), 667. His application was denied (*Ibid.*) upon his failure to provide the State Education Department with proof of the filing of a petition for naturalization. Memorandum in Support of Plaintiff's Motion for Summary Judgment, p. 4 (hereinafter "Mauclet Memorandum"). Appellee Mauclet has resided in New York State since April 1969, is married to an American citizen and the father of a child of that marriage (14a). He "intends to reside permanently in the United States . . . [but] does not wish to relinquish his French citizenship at this time," Mauclet Memorandum, p. 4.

Appellee Rabinovitch is a Canadian citizen (14a) and an undergraduate student at Brooklyn College in New York City. Amended Complaint ¶ 16. In April 1973, he was advised by the State Board of Regents that he had qualified for a Regents Scholarship on the basis of his performance on an examination held for that scholarship (14a and Amended Complaint ¶ 13). See NYEL §§ 605(1), 670. He was provided with the appropriate forms for the Regents Scholarship and for tuition assistance [NYEL §§ 604(1), 667] together with an application for United States citizenship. He refused to complete the citizenship application and was subsequently advised that the offer of the Regents Scholarship was withdrawn because of that refusal (14a and Amended Complaint ¶¶ 14, 15). Although appellee Rabinovitch has never applied for a state student loan (NYEL § 680 *et seq.*), he alleged that he believed he would need such loans in the future and that he believed he would be disqualified by operation of NYEL § 661(3) (15a and Amended Complaint ¶ 20). Appellee has resided in New York State since 1964 (Amended Complaint ¶ 16), "intends to continue to reside . . . in New York," and "intends to retain his Canadian citizenship . . . not . . . to seek naturalization as an American citizen" (Amended Complaint ¶ 18).

Appellees commenced separate actions for declaratory and injunctive relief against NYEL S661(3). *Mauclet* v. *Nyquist* was commenced in the Western District of New York, and *Rabinovitch* v. *Nyquist* was commenced in the Eastern District of New York. *Mauclet* challenged NYEL

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* Phrase "(d)" was added by c. 663, § 1 of the New York Laws of 1975. The phrase was not considered below.

** Numbers in parentheses refer to the appendices to this Jurisdictional Statement.

§ 661(3) as unconstitutional under the Equal Protection Clause and as conflicting with the federal regulation of immigration and naturalization (2a). *Rabinovitch* presented the same challenges to NYEL § 661(3) (Amended Complaint ¶¶ 22, 24) and claimed a violation of appellee's right to substantive due process of law because of the statute's alleged reliance upon a conclusive presumption that was not necessarily nor universally true in fact (Amended Complaint ¶ 23). *Rabinovitch* also included a demand for damages equal to the amount appellee allegedly would have received as a recipient of a Regents Scholarship and tuition assistance for the academic years 1973-74 and 1974-75 (Amended Complaint, Prayer for Relief ¶ 5).

The single district judges in *Mauclet* and *Rabinovitch* held that the constitutional claims were sufficient to vest the court with jurisdiction under 28 U.S.C. § 1343(3) and requested the Chief Judge of the Second Circuit to convene three-judge district courts (2a-3a; 6a-9a, 10a). The late Hon. Orrin G. Judd, the single district judge in *Rabinovitch*, also denied that appellee's motion for a class action order noting that a class action would not be a superior method of adjudication and that the allegations in support of the motion were speculative (9a-10a). The cases were then consolidated before a three-judge court (Appendix C, pp. 11a-12a) and determined on cross-motions for summary judgment.

Although NYEL § 661(3) authorizes state financial aid for alien students, the three-judge court held that the fact that some aliens were excluded was sufficient to create an "'*inherently suspect classification*'" subject to "'*close judicial scrutiny*'" [15a-16a, quoting *Graham* v. *Richardson*, 403 U.S. 365, 372 (1971), emphases added by three-judge court]. Applying this strict standard, the court found the state interests advanced in support of the statute were insufficient. New York's interest in limiting its bounty to aliens who make an affirmative political commitment to the United States and to the state was viewed as a restatement of the 'special public interest' doctrine rejected in *Sugarman* v. *Dougall*, 413 U.S. 634, 644 (1973) and *Graham* v. *Richardson*, *supra* at 374 (17a). New York's interest in providing an inducement to aliens to become members of its political community and its interest in enhancing the education of its electorate were viewed as not "compelling" (18a). The three-judge court allowed appellee Rabinovitch standing to challenge NYEL § 661(3) insofar as it regulated student loans (as distinguished from tuition assistance and Regents Scholarships) although appellee had not applied for a student loan, and the record did not establish that he was qualified but for his alien status (15a). The court disallowed appellee's claim for damages relying on *Edelman* v. *Jordan*, 415 U.S. 651 (1974) (18a).

Reasons in Support of Plenary Consideration

The decision below erroneously extends *Graham* v. *Richardson*, 403 U.S. 365 (1971), by applying a strict equal protection standard to a classification which in fact benefits aliens as well as citizens and by rejecting as insubstantial New York's interest in rewarding aliens who choose to identify with its political community and its interests in enhancing the membership of that political community both in terms of numbers and educational level. The recent decisions of this court in *Mathews* v. *Diaz*, —— U.S. ——, 44 U.S.L.W. 4748 (June 1, 1976) and *Hampton* v. *Mow Sun Wong*, —— U.S. ——, 44 U.S.L.W. 4737 (June 1, 1976) conclusively establish the errors of the district court.

A. The equal protection standard applicable to NYEL § 661(3) is one of reasonable relation to a legitimate state interest.

NYEL § 661(3) authorizes state financial aid to students pursuing higher educations who are citizens, aliens willing to petition for naturalization, aliens presently disabled from petitioning but willing to seek naturalization when their disability ceases and alien refugees paroled to the

United States Attorney General. Plainly, the statute does not distinguish between citizens and aliens for the purpose of granting and denying a public benefit as did the statutes subjected to "strict scrutiny" in *Graham, supra; Sugarman* v. *Dougall,* 413 U.S. 634 (1973) and *In re Griffiths,* 413 U.S. 717 (1973). Once aliens are combined with citizens, as they are under NYEL § 661(3), they are not a "discrete and insular" minority, *United States* v. *Carolene Products Co.,* 304 U.S. 144, 152-153 n. 4 (1938), and no basis exists for heightend judicial solicitude. Cf. *Graham* v. *Richardson, supra* at 372. Thus, in sustaining a federal statute which excluded all aliens except those with five years permanent residence from Medicare benefits, this Court stated that the "real question presented" was not "whether the discrimination between citizens and aliens . . . [was] permissible; . . . [but] whether the statutory discrimination *within* the class of aliens . . . [was] permissible." *Mathews* v. *Diaz, supra* at 4452 (emphasis original). The Court then proceeded to apply the Fifth Amendment analogue of the reasonable relation test, stating that the burden of demonstrating the invalidity of the statute is upon the party challenging its constitutionality and consists of that party's advancing reasoning which will "at once invalidate" the classification "yet tolerate a different line separating some aliens from others." *Mathews* v. *Diaz, supra* at 4753.* The court

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* Appellants recognize that a federal statute was involved in *Diaz, supra,* and that this Court has noted that by reason of the paramount federal power over immigration and naturalization, some federal limitations on aliens may be enforced even though identical state limitations may be unconstitutional. *Hampton* v. *Mow Sun Wong, supra* at 4740. However, this distinction between federal and state power is inapposite with respect to the classification here in issue which distinguishes among aliens already lawfully admitted as did the *Diaz* statute and contravenes no federal statute or policy. Moreover, NYEL § 661(3) has less effect on the aliens excluded from benefits than did the *Diaz* statute since all that is disallowed herein is a financial incentive for higher education as opposed to medical insurance for the aged not readily available at the same cost in the private sector.

below erroneously placed this burden on the defendants, appellants herein (17a).

Even if the strict scrutiny standard is applied to NYEL § 661(3), appellants' showing in support of the statute does not consist of proof of its abstract "compelling" quality as required by the district court (18a), but simply in a showing of the "substantiality of the State's interest in enforcing the statute in question, and . . . the narrowness of the limits within which the discrimination is confined." *Sugarman* v. *Dougall, supra* at 642. In this context, it is significant to note that *Sugarman* was limited to a "flat ban on the employment of aliens in positions that have little, if any relation to a State's legitimate interest" (Id. at 647) and expressly excepted narrowly drawn citizenship qualification requirements from the strict scrunity standard (Ibid.). This Court has stated more recently that its prior decisions were not intended or suggest that a "State . . . may not be permitted some discretion in determining . . . whether aliens may receive public benefits or partake of public resources on the same basis as citizens," *Examining Board of Engineers, Architects, and Surveyors* v. *De Otero,* —— U.S. ——, 44 U.S.L.W. 4890, 4900 (June 15, 1976), and that disparate treatment between citizens and aliens "does not in itself imply" invidious discrimination. *Mathews* v. *Diaz, supra* at 4452.

B. The state aid provided to citizen students and to designated classes of aliens by NYEL § 661(3) is legitimately and substantially related to New York's interests in rewarding political affiliation with the United States and the state and in enhancing its own political community.

It is within a state's legitimate interest to enact legislation which takes into account the character of the relationship between an alien and his state and country. A state may decide that "as the alien's tie grows stronger, so does the

strength of his claim to an equal share of . . . [its] munificence." *Mathews* v. *Diaz, supra* at 4452. It may, in distributing its bounty, choose those who "may reasonably be presumed to have a greater affinity with the United States than those who do not. In short, citizens and those who are most like citizens qualify. Those who are less like citizens do not." Id. at 4753.

"Alienage itself is a factor that reasonably [can] be employed in defining 'political community,' " *Sugarman* v. *Dougall, supra* at 649, and it is well within a state's legitimate interests to enhance that political community by increasing the educational level of the electorate, *Spatt* v. *State of New York,* 361 F.Supp. 1048, 1053-1055 (E.D. N.Y.) aff'd 414 U.S. 1058 (1973), and by providing inducements to membership. *Hampton* v. *Mow Sun Wong, supra* at 4742, 4745.

NYEL § 661(3) is precisely tailored to these obviously substantial interests. The statute rewards those aliens who become "more like citizens" by pursuing naturalization either at present or when relieved of federally imposed disabilities. It provides an inducement to enter the state and national political community and seeks to assure that both old and new members of that community will attain the highest educational level they are capable of achieving, thus serving national and state interests in an educated electorate.

Although not considered by the district court, it is significant to note that the inclusion of the paroled refugee in the benefited class does not make the statute imprecise. Parole status precludes an alien's entry into the national or state political community at least until that status is changed. 8 U.S.C. § 1182(d)(5). See *Mathews* v. *Diaz, supra* at 4751 and n. 7. However, both national and state governments have long recognized their humane obligations to this special class of individuals who have sought

refuge in the United States from persecutions in the countries of their nationalities.

The only aliens excluded by NYEL § 661(3) are those, like appellees, who voluntarily refuse American citizenship, preferring to retain their national allegiances. As a result of the statute, these aliens are denied only some public aid in pursuing higher educations in New York, not the right to pursue that education at private or public institutions in the state. Plainly, these aliens are less deserving of public funds than the benefited class and the resulting limitation on their economic interests is minimal in comparison to the state interests served by the statute.

C. Appellee Rabinovitch does not have standing to challenge the constitutionality of NYEL § 661(3) insofar as it regulates the award of student loans as distinguished from tuition assistance and Regents Scholarships.

The district court allowed appellee Rabinovitch "expanded" standing to challenge the use of NYEL § 661(3) in the award of student loans although the record did not and could not establish that the appellee would be financially qualified for a loan at a date in the future when he might choose to apply (15a). The district court relied upon *Eisenstadt* v. *Baird,* 405 U.S. 438 (1972) and *Barrows* v. *Jackson,* 346 U.S. 249 (1953) wherein claimants were permitted to invoke the constitutional rights of others when the claimants themselves were threatened with immediate harm. In contrast, appellee's claim has no immediacy because of his failure to apply, and the alleged injury to his constitutional rights is wholly speculative because the basis of the disposition of his application cannot be established in advance. Accordingly, this challenge to NYEL § 661(3) is not presented in an appropriate Article III context, and should have been disallowed. *O'Shea* v. *Littleton,* 414 U.S. 488 (1974); *Golden* v. *Zwickler,* 394 U.S. 103 (1969); *Massachusetts* v. *Mellon,* 262 U.S. 447 (1923).

CONCLUSION

For the foregoing reasons, it is respectfully requested that this court note probable jurisdiction and grant plenary consideration to the instant appeal.

Dated: New York, New York, August 11, 1976.

Respectfully submitted,

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Appendix A

Opinion of the Single District Judge in *Mauclet* v. *Nyquist*.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Civ-75-73

JEAN-MARIE MAUCLET,
Plaintiff

v.

EWALD B. NYQUIST, Commissioner of Education
of the State of New York,
Defendant

APPEARANCES: KEVIN KENNEDY, Esq. and
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for Defendant.

The plaintiff, a graduate student at the State University of New York at Buffalo, has been a resident of New York State since April 1969 and has been a permanent United States resident since November 1969. He is a French citizen.

Appendix A.

Plaintiff challenges the constitutionality of New York Education Law § 602.2 on the grounds that it unconstitutionally discriminates against resident aliens and conflicts with the constitutional and congressional scheme of comprehensive national regulation of immigration and naturalization.[1] The plaintiff, who has submitted an application for a tuition assistance program award for the academic year 1974-75, satisfies all requirements for an award except for citizenship. He moves for the convening of a three-judge court and for declaratory and injunctive relief.

Defendant has moved to dismiss the complaint on the ground that plaintiff's claim is insubstantial. A claim is insubstantial only if frivolous or "if its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject." *Goosby* v. *Osser*, 409 U.S. 512, 518 (1973). Under this standard, defendant's motion to dismiss must be denied and plaintiff's motion to convene a three-judge court granted.

Alienage has been held to be a suspect classification. *See, e.g., Graham* v. *Richardson*, 403 U.S. 365 (1971). Statutes that treat aliens differently from citizens require a great degree of precision. *Sugarman* v. *Dougall*, 413 U.S. 634, 642 (1973) (New York flat statutory prohibition against the employment of aliens in the competitive classified civil service unconstitutional). In *Jagnandin* v. *Giles*, 379 F. Supp. 1178 (N.D. Miss. 1974), a three-judge court invalidated a Mississippi statute which classified all alien students as non-residents for purposes of charging tuition and fees. A Virgin Islands law which barred noncitizen residents the right to participate in the Territorial Scholarship Fund solely by reason of their alienage was also held to be unconstitutional. *Chapman* v. *Gerard*, 456 F.2d 577 (3d Cir. 1972). The *Chapman* court discarded the argument, as have other courts, that participation in the scholarship fund is a privilege and not a right. *See also Shapiro* v. *Thompson*, 394 U.S. 613 (1969).

[1] Section 602.2 provides the following eligibility requirements and conditions governing awards:

> 2. Citizenship. An applicant (a) must be a citizen of the United States, or (b) must have made application to become a citizen, or (3) if not qualified for citizenship, must submit a statement affirming intent to apply for United States citizenship as soon as he has the qualifications, and must apply as soon as eligible.

(McKinney's Supp. 1975)

Appendix A.

Applying the guidelines given in *Goosby* v. *Osser, supra,* and *Nieves* v. *Oswald*, 477 F.2d 1109 (2d Cir. 1973), the court finds that the complaint of the plaintiff does raise a substantial constitutional question within the meaning of the three-judge court statute.

Accordingly, the Honorable Chief Judge of the United States Court of Appeals for the Second Circuit is hereby requested to convene a three-judge court to hear and determine this cause.

So ordered.

JOHN T. CURTIN
JOHN T. CURTIN
United States District Judge

DATED: May 22, 1975

Appendix B

Opinion of the Single District Judge in *Rabinovitch* v. *Nyquist et al.*

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

74-C-1142

ALAN RABINOVITCH, on behalf of himself and on behalf of all others similarly situated; namely, all residents of New York State who have been or may be denied New York State Regents Scholarships, scholar incentive assistance awards and loans administered by the New York Higher Education Assistance Corporation solely on the basis of their status as aliens,

Plaintiffs,

—against—

EWALD B. NYQUIST, Commissioner of Education of the State of New York, THE UNIVERSITY OF THE STATE OF NEW YORK, THE BOARD OF REGENTS OF THE STATE OF NEW YORK, THE NEW YORK HIGHER EDUCATION ASSISTANCE CORPORATION and WILLARD C. ALLIS, DR. ERNEST BOYER, DR. JUDAH CAHN, WILMOT R. CRAIG, THOMAS P. DENN, WALTER A. KASSENBROCK, NORMA KERSHAW, REV. LAURENCE J. MCGINLEY, S. J., WILLIAM G. MORTON and RUSSEL N. SERVICE, being the members of the board of directors of said corporation,

Defendants.

Dated: May 23, 1975

Appendix B.

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JUDD, J.

MEMORANDUM AND ORDER

Plaintiffs have moved for the convening of a three-judge court and for certification of the case as a class action.

Facts

The complaint seeks injunctive relief against Section 602(2) of the New York Education Law. Plaintiff's attack is based on the claim that he was disqualified for a New

Appendix B.

York State Regents Scholarship, although he won a competitive test, because he is an alien who does not intend to apply for American citizenship. Plaintiff has been lawfully admitted to permanent residence within the United States and has resided in New York since 1964.

The claim for class action certification is based on the assertion that plaintiff knows five individuals who have been denied educational assistance funds because of their status as aliens and that the census figures indicate that there may be as many as 200,000 resident aliens who might seek the benefit of the statutes under attack.

Discussion

1. Jurisdiction of the action exists under 28 U.S.C. § 1343(3), without the necessity of establishing the jurisdictional amount of $10,000. *Hagans* v. *Lavine,* 415 U.S. 528, 535-36, 94 S.Ct. 1372, 1380 (1974).

2. In determining the necessity for a three-judge court, the issue is whether plaintiff's claim is "wholly insubstantial," *Bailey* v. *Patterson,* 369 U.S. 31, 33, 82 S.Ct. 594, 551 (1962), or whether "its unsoundness so obviously results from previous decisions of [the Supreme Court] as to foreclose the subject." *Ex parte Poresky,* 290 U.S. 30, 32, 54 S.Ct. 3, 4 (1933). See also *Goosby* v. *Osser,* 409 U.S. 512, 518, 93 S.Ct. 854, 858 (1973); *Rosenthal* v. *Board of Education,* 497 F.2d 726 (2d Cir. 1974).

The United States Supreme Court has recently held that alienage is not a valid reason for states to deny various benefits to persons.

In *Graham* v. *Richardson,* 403 U.S. 365, 91 S.Ct. 1848 (1971), the court struck down state statutes barring noncitizens or, in one case, those who had not been residents for fifteen years, from categorical assistance. It held that

Appendix B.

"classifications based on alienage, like those based on nationality, or race, are inherently suspect and subject to close judicial scrutiny." 403 U.S. at 372, 91 S.Ct. at 1852. It expressly rejected the argument that the "special public interest," *i.e.,* the "State's desire to preserve limited welfare benefits for its own citizens," justified restricting benefits to citizens and longtime residents. The court also suggested that such state statutes conflict with the "complete scheme of regulation" governing the qualifications for entry and status of immigrants which the federal government has enacted pursuant to its constitutional authority. 403 U.S. at 378, 91 S.Ct. at 1855.

In *Sugarman* v. *Dougall,* 413 U.S. 634, 93 S.Ct. 2844 (1973), the court voided a New York law barring noncitizens from permanent competitive positions in the state civil service, even though the "record does not disclose that any of the four appellees ever took any steps to attain United States citizenship." 413 U.S. at 638, 93 S.Ct. at 2845. Though the holding rested somewhat on the fact that the classification was both over and underinclusive with regard to the purported state purpose of limiting government service to those fully aware of American mores, the court cited *Graham* and basically decided that the state had failed to advance a forceful reason for employing a suspect classification. 413 U.S. at 642-46, 93 S.Ct. at 2848-49. It noted the various obligations of membership in the political community which resident aliens fulfill, and replied to the argument that resident aliens are more likely to leave the state at some time by quoting the lower court's view that the state would be "hard pressed to demonstrate that a permanent resident alien who has resided in New York or the surrounding area for a number of years . . . would be a poorer risk for a career position in New York . . . than an American citizen." 413 U.S. at 645, 93 S.Ct. at 2849, quoting 339 F. Supp 906, 909.

Appendix B.

In *In re Griffiths,* 413 U.S. 717, 93 S.Ct. 2851 (1973), the court invalidated a Connecticut statute which disqualified even permanent resident aliens from membership in the bar. It said that "Resident aliens, like citizens, pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society. It is appropriate that a State bear a heavy burden when it deprives them of employment opportunities." 413 U.S. at 722, 93 S.Ct. at 2855. The court found that the state had not proffered any persuasive justification.

The Supreme Court now has before it three cases bearing on the issues in this case. In *Mow Sun Wong* v. *Hampton,* 500 F.2d 1031 (9th Cir. 1974), *cert. granted,* 94 S.Ct. 3067, the lower court voided as violative of due process a regulation of the United States Civil Service Commission barring non-citizens from competitive positions. In *Weinberger* v. *Diaz,* 361 F. Supp. 1 (S.D. Fla. 1973) (three-judge court), *prob. juris. noted,* 94 S.Ct. 2381 (1974), the lower court invalidated the exclusion of aliens who have not been continuous residents for five years from a supplemental medical insurance plan enacted as part of Medicare. And in *Ramos* v. *United States Civil Service Commission,* 376 F. Supp. 361 (D. P.R. 1974) (three-judge court), appeal filed August 30, 1974, No. 74-216), the lower court held, after *Sugarman,* that the federal government could not exclude resident aliens from civil service employment or from eligibility for federal disaster relief loans.

The New York statute in question here was sustained by a state court in *Friedler* v. *University of New York,* 70 Misc.2d 444, 333 N.Y.S.2d 928 (Sup. Ct. Erie Co. 1972). This decision predated all the Supreme Court cases outlined above, except for *Graham,* which was not cited. It does not oblige this court to view plaintiffs' claim as "wholly insubstantial."

The issue in the case at bar was not decided in *Spatt* v. *New York,* 361 F. Supp. 1048 (E.D.N.Y. 1973), *aff'd,* 94

Appendix B.

S.Ct. 563 (1973), which merely upheld the requirement that Regents Scholarships be used at institutions within New York State. That case did not involve alienage, was decided on the "rational basis" test, and depended on specific purposes advanced by the state in support of the particular law.

No United States Supreme Court case has decided the effect of alienage on the right to public grants for higher education. In light of the Supreme Court cases outlined above, the basic issue in this case may be whether there is something about Regents Scholarships which sufficiently differentiates them from licensure in a profession, or eligibility for civil service employment, or public assistance, so that a state's discrimination against aliens would be permissible. It may be that scholarships are less vital to existence than a job or welfare grants, or it may be that the state can cite some compelling purpose which the classification advances. But the Supreme Court cases cited above, far from foreclosing a challenge to this statute, provide an array of philosophical and practical arguments militating against the constitutionality of this type of classification. It is therefore necessary to request the convening of a three-judge court, pursuant to 28 U.S.C. § 2281.

Plaintiffs' proposed amendment of the complaint to refer to the modified New York statute (L. 1974, c. 942) will not affect the conclusion in this memorandum.

3. The motion for class action status is based on the assertion that the class is a large one, but gives little attention to the requirement of F.R.Civ.P. 23(b)(3) that the court find that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Apart from the fact that four students in the Buffalo area have brought actions attacking the statute within the last three years, the only evidence of the size of the class is based on estimates from census figures.

Appendix B.

Certifying the matter as a class action requires some identification of the members of the class and provision for notice at the expense of plaintiffs. *Eisen* v. *Carlyle,* 417 U.S. 156, 94 S.Ct. 2140 (1974). Class action procedure is therefore a cumbersome method, which is not particularly helpful where the issue is one of the constitutionality of a statute. Any decision of the legal issues in this case will have *stare decisis* effect, even more so if this case is consolidated with the case pending before Judge Curtin in the Western District of New York. *Mauclet* v. *Nyquist,* Civ. 75-73. The plaintiff in this case will not graduate until mid-1977. It is probable that the case will be decided on the merits before then. In this case no real necessity has been shown for treating the case as a class action.

It is ORDERED that the motion for the designation of a three-judge court be granted. The court will notify the Chief Judge of the Circuit.

It is further ORDERED that the motion for class action status be denied.

ORRIN G. JUDD
U.S.D.J.

Appendix C

Order Consolidating *Mauclet* and *Rabinovitch* for Hearing.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Civ-75-73

JEAN-MARIE MAUCLET,

Plaintiff

—vs—

EWALD B. NYQUIST, Commissioner of Education of the State of New York,

Defendant

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

74-C-1142

ALAN RABINOVITCH, on behalf of himself and on behalf of all others similarly situated; namely, all residents of New York State who have been or may be denied New York State Regents Scholarships, etc.,

Plaintiffs

—against—

EWALD B. NYQUIST, Commissioner of Education of the State of New York, THE UNIVERSITY OF THE STATE OF NEW YORK, et al.,

Defendants

Appendix C.

These cases will be heard together on July 22, 1975 in New York City, the exact location not yet determined.

Briefs in these cases shall be submitted on the following schedule. Plaintiffs' briefs shall be filed not later than Friday, June 27, 1975. Defendants' responses shall be filed not later than Monday, July 14, 1975. Any reply briefs shall be received no later than Friday, July 18, 1975. A copy of each brief shall be forwarded to each judge on the panel.

So ordered.

JOHN T. CURTIN
JOHN T. CURTIN
United States District Judge

DATED: June 3, 1975

Appendix D

Opinion of the Three-Judge District Court.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

[SAME TITLE]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

Before VAN GRAAFEILAND, Circuit Judge, JUDD, District Judge for the Eastern District of New York, and CURTIN, Chief Judge, Western District of New York.

CURTIN, Chief Judge:

Mauclet v. *Nyquist* was instituted by a resident alien in the Western District of New York; *Rabinovitch* v. *Nyquist* was brought by a resident alien in the Eastern District of New York. In both cases, New York Education Law § 661(3) (McKinney's Supp. 1975),[1] which requires an

[1] § 661(3), former § 602(2), provides, in pertinent part, as follows:

> Citizenship. An applicant (a) must be a citizen of the United States, or (b) must have made application to become a citizen, or (c) if not qualified for citizenship, must submit a statement affirming intent to apply for United States citizenship as soon as he has the qualifications, and must apply as soon as eligible for citizenship.
> (McKinney's Supp. 1975.)

applicant for New York State financial aid[2] to be a United States citizen or intend to become a citizen, was challenged as unconstitutional. The cases were consolidated and heard by a three-judge court pursuant to 28 U.S.C. §§ 2281, 2284. The facts as set out below are not in dispute.[3]

Plaintiff Jean-Marie Mauclet, a resident of New York State since April 1969, is a graduate student at the State University of New York at Buffalo. He is a French citizen, married to an American citizen and father of an American citizen. He submitted an application for a tuition assistance award for the academic year 1974-1975 and satisfies all requirements for the award except citizenship.

Plaintiff Alan Rabinovitch, a Canadian citizen, has been a resident of New York State since 1964. In January 1973, Mr. Rabinovitch took the competitive Regents Qualifying Examination, and thereafter was informed by defendants University of the State of New York and the Board of Regents that he was qualified to receive a regents scholarship. Subsequently, Mr. Rabinovitch was informed that the offer of scholarship was withdrawn solely because he did not intend to become a citizen, as required by § 661(3).

Both plaintiffs seek a judgment declaring § 661(3) invalid, enjoining its enforcement and requiring defendants to process the plaintiffs' applications for assistance. In addition, plaintiff Rabinovitch requests damages for past

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[2] There are three general forms of student financial assistance: (1) General Awards, which include tuition assistance; (2) Academic Performance Awards, including regents scholarships; and (3) Student loans and loan guarantees. N.Y. Educ. Law §§ 667-680 (McKinney's Supp. 1975).

[3] Both plaintiffs motioned to amend their complaints to include the New York State Higher Education Services Corporation, an educational corporation formed in 1975, which coordinates the New York State financial aid programs. N.Y. Educ. Law § 652 (McKinney's Supp. 1975). The motions were granted orally at the three-judge court.

monies withheld by defendants. Both plaintiffs ask for attorney fees and costs.

Plaintiffs contend that § 661(3) denies to resident aliens the equal protection of the laws guaranteed by the fourteenth amendment, and conflicts with the comprehensive and preemptive congressional scheme regulating the entry and residence of aliens in the United States.

We must first resolve the preliminary question of standing. Clearly, plaintiffs have standing to contest the statute as it applies to the scholarship and tuition assistance award programs. However, defendants claim that plaintiffs do not have standing to challenge § 661(3) with respect to the student loan aspect of the program. Rabinovitch never applied for a student loan and Mauclet received one in the past, before he announced his intention not to become a United States citizen. At oral argument, the State admitted that had Rabinovitch applied for a student loan, and refused to make the required statement of intention to become a United States citizen, his application would have been refused. But the State apparently feels that the actual denial of an application is necessary to give plaintiffs standing to contest the constitutionality of § 661(3) as regards student loans. We do not agree.

Nothing would be gained by adjudicating the statute as it applies to all but one aspect of the assistance program. Both plaintiffs allege injuries from this statute. Both would be further injured were they to apply for student loans. We feel that this is a proper case in which to apply the expanded concept of standing and allow these plaintiffs to assert the rights of those aliens who are injured by this statute with regard to loans. *Eisenstadt* v. *Baird*, 405 U.S. 438, 443-446 (1972); *Barrows* v. *Jackson*, 346 U.S. 249 (1953).

In *Graham* v. *Richardson*, 403 U.S. 365 (1971), the Supreme Court declared:

> [C]lassifications based on alienage, like those based on nationality or race, are *inherently suspect and subject*

> *to close judicial scrutiny.* Aliens as a class are a prime example of a "discrete and insular" minority . . . for whom such heightened judicial solicitude is appropriate. 403 U.S. at 372. (Footnotes and citations omitted, emphasis added.)

The defendants maintain that the classification involved here is not based on alienage per se because only those aliens who do not wish to become citizens are denied assistance. The defendants emphasize that the applications of many resident aliens have been granted after these individuals either applied for United States citizenship or signed a statement agreeing to do so as soon as they were eligible. This argument defies logic. Those aliens who apply, or agree to apply when eligible, for citizenship are relinquishing their alien status. Because some aliens agree under the statute's coercion to change their status does not alter the fact that the classification is based solely on alienage.

Next the defendants argue that since education is not a fundamental or basic constitutional right, *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1 (1973), the standard of strict judicial scrutiny is inapplicable. But it is long settled that where a suspect classification is involved, strict scrutiny is to be invoked whether or not the right involved is fundamental. *Graham* v. *Richardson, supra*, at 375-376.

In the case *In Re Griffiths*, 413 U.S. 717 (1973), in which a Connecticut rule excluding aliens from admission to the practice of law was struck down, the Supreme Court was explicit as to the burden a state must bear to justify the use of a suspect classification:

> The Court has consistently emphasized that a State which adopts a suspect classification "bears a heavy burden of justification," *McLaughlin* v. *Florida*, 379 U.S. 184, 196 (1964), a burden which, though variously

> formulated, requires the State to meet certain standards of proof. In order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is "necessary . . . to the accomplishment" of its purpose or the safeguarding of its interest. 413 U.S. at 721-722 (footnotes omitted).

Defendants have failed to meet this burden. First they argue that the various forms of assistance are gratuities that can be distributed according to the sovereign's will. But the Supreme Court "has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'" *Graham* v. *Richardson, supra*, at 374. Next the State asserts that its interest in an educated electorate, fully able to participate in community political life, and the plaintiffs' refusal to accept the responsibilities of citizenship, are sufficient reasons for it to limit assistance to citizens and future citizens. For this proposition, the State cites *Spatt* v. *New York*, 361 F.Supp. 1048, *aff'd* 414 U.S. 1058 (1973), in which the State's requirement that its assistance could only be used at colleges and universities within New York State was upheld. It is doubtful that defendants' explanation would survive even the rational relationship test applied in *Spatt*.[4] Although resident aliens may not vote, they pay taxes, register with the Selective Service, and "contribute in

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[4] The court in *Spatt* found no fundamental right or suspect classification invoking strict scrutiny, and therefore analyzed the State's interests under the rational relationship test. The court found that the State had a valid interest in encouraging gifted students to attend New York schools, in building a strong system of colleges within the State and in attempting to achieve an equalization of school financing costs between in-state and out-of-state students. None of the above mentioned interests are served by excluding qualified, tax-paying resident aliens.

myriad other ways to our society." *In Re Griffiths, supra,* at 722. In any case, the State has not demonstrated a compelling interest justifying its discriminatory classification. § 661(3) is therefore unconstitutional and defendants are enjoined from its enforcement. Defendants are directed to process plaintiff Mauclet's 1974-1975 tuition assistance application that was pending when he started this suit, and to re-qualify plaintiff Rabinovitch as a State regents scholarship recipient, as of the date his complaint was filed.

Having ruled on plaintiffs' fourteenth amendment claim, there is no need to reach plaintiffs' argument that § 661(3) is unconstitutional because it encroaches on the exclusive federal power over aliens.

Plaintiff Rabinovitch requests money damages in addition to injunctive relief. While declaratory and injunctive relief is appropriate, it is the opinion of this court that *Edelman* v. *Jordan*, 415 U.S. 651 (1974), holding that the eleventh amendment barred the courts from ordering state officials to remit benefits wrongfully withheld from eligible welfare applicants, does not allow the award of money damages in this case.

So ordered.

s/ ELLSWORTH A. VAN GRAAFEILAND
Ellsworth A. Van Graafeiland
United States Circuit Judge

s/ ORRIN G. JUDD
Orrin G. Judd
United States District Judge
Eastern District of New York

s/ JOHN T. CURTIN
John T. Curtin
United States District Judge
Western District of New York

Dated: February 11, 1976.

Appendix E

Judgment of the Three-Judge District Court.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

[SAME TITLE]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

This action came on for trial before a three judge court, the Honorable Ellsworth A. Van Graafeiland, United States Circuit Judge, the Honorable Orrin G. Judd, United States District Judge, and the Honorable John T. Curtin, United States District Judge, presiding, and a memorandum and order of the court having been filed on February 17, 1976, that New York Education Law § 661(3) is unconstitutional and that defendants are enjoined from its enforcement and directing the defendants to process plaintiff Mauclet's 1974-1975 tuition assistance application that was pending when he started this suit, and to re-qualify plaintiff Rabinovitch as a State regents scholarship recipient, as of the date his complaint was filed, and denying money damages to plaintiff Rabinovitch,

ORDERED and ADJUDGED that New York Education Law § 661(3) is unconstitutional and the defendants are enjoined from its enforcement, and that the defendants process plaintiff Mauclet's 1974-1975 tuition assistance application that was pending when he started this suit, and

Appendix E.

re-qualify plaintiff Rabinovitch as a State regents scholarship recipient, as of the date his complaint was filed and that the plaintiff Rabinovitch is not entitled to money damages.

Dated: Brooklyn, New York
March 26, 1976

LEWIS ORGEL
Clerk

ELLSWORTH VAN GRAAFEILAND
U.S.C.J.

JOHN T. CURTIN
U.S.D.J.

ORRIN G. JUDD
U.S.D.J.

[Filed March 29, 1976
E.D.N.Y.]

Appendix F

Notice of Appeal.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

[SAME TITLE]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

NOTICE IS HEREBY GIVEN, that the defendants herein hereby appeal to the Supreme Court of the United States from so much of the amended final order and judgment of this Court entered March 29, 1976, which, *inter alia*, declared New York Education Law § 661(3) unconstitutional, enjoined its enforcement, directed the requalification of the plaintiff Rabinovitch as a State Regents scholarship recipient and the processing of plaintiff Mauclet's application for tuition assistance.

This appeal is taken pursuant to 28 U.S.C. § 1253.

LOUIS J. LEFKOWITZ
Attorney General of New York State
By

Robert S. Hammer
ROBERT S. HAMMER
Assistant Attorney General
Attorney for Defendants
Office & P.O. Address:
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-3394

[Filed May 28, 1976]

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-208

EWALD B. NYQUIST, Commissioner of Education of the State of New York, and NEW YORK STATE HIGHER EDUCATION SERVICES CORPORATION,

Appellants,

against

JEAN-MARIE MAUCLET,

Appellee.

EWALD B. NYQUIST, Commissioner of Education of the State of New York, THE UNIVERSITY OF THE STATE OF NEW YORK, THE BOARD OF REGENTS OF THE STATE OF NEW YORK, THE NEW YORK HIGHER EDUCATION ASSISTANCE CORPORATION, WILLARD C. ALLIS, DR. ERNEST BOYER, DR. JUDAH CAHN, WILMOT R. CRAIG, THOMAS P. DENN, WALTER A. KASSENBROCK, NORMA KERSHAW, REV. LAURENCE J. MCGINLEY, S. J., WILLIAM G. MORTON and RUSSEL N. SERVICE, being the members of the board of directors of said corporation, and THE NEW YORK STATE HIGHER EDUCATION SERVICES CORPORATION,

Appellants,

against

ALAN RABINOVITCH,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURTS FOR THE WESTERN AND EASTERN DISTRICTS OF NEW YORK

Jurisdictional Statement Filed August 11, 1976

Probable Jurisdiction Noted November 1, 1976

INDEX TO APPENDIX

† Additional defendants are not indicated hereafter.

Relevant Docket Entries in *Mauclet* v. *Nyquist, et ano.*†

Date	Proceedings
1975	
Feb. 13	Filed complaint.
13	Issued summons and one (1) copy
Mar. 24	Filed Mar. ret. on S&C served on Ewald B. Nyquist on 2-19-75
24	Filed Defts motion for an order dismissing the complaint etc. ret. 4-7-75
Apr. 4	Filed Plfts. memorandum in support of pltfs. request for a 3-Judge Ct. and in opposition to defts. Nyquist motion to dismiss.
May 5	Filed Deft., Nyquist, Memorandum of law.
16	Filed Pltfs. reply memorandum.
22	Filed decision & order denying defts. motion to dismiss & granting pltfs. motion to convene a 3-judge Ct. & requesting the Honorable Chief Judge of the U.S. Ct. of Appeal for the 2nd Circuit to convene a 3-judge ct. to hear & determine this cause—Curtin, DJ F-164
30	Filed order designating Judges John T. Curtin, Ellsworth VanGraafeiland & Orrin G. Judd to hear & determine said cause—Irving R. Kaufman, Chief Judge U.S. Ct. of Appeals Second Circuit [• • •]• F-164
June 3	Filed order that these cases (Civ-75-73 & 74-C-1142) will be heard on 7-22-75 in NYC [• • •]
25	Filed Pltfs. motion to amend complaint and for summary judgment
25	Filed Pltfs. memorandum in support of motions to amend the complaint and for summary judgment.

† Additional defendants are not indicated hereafter.

• [• • •] indicates that portion of entry regarding filing dates and/or notice and copies to attorneys for parties has been omitted.

Relevant Docket Entries in Mauclet v. Nyquist

Date	Proceedings
July 17	Filed Defts'. Memorandum of Law
17	Defts'. Notice of Motion and Statement under General Rule 9(g) (motion to dismiss or for summary judgment relates also to 74-Civ-1142 in EDNY and is returnable at Brooklyn)
1976	
Feb. 11	Filed Decision & Order of the Three Judge Court declaring Sec. 661(3) of the New York Education Law unconstitutional and enjoining defts. from its enforcement: directing Defts. to process Pltf. Mauclet's 1974-75 tuition assistance application, etc.—VanGraafeiland, U.S. Circuit Judge, Orrin Judd U.S. Dist. Judge Eastern Dist. of N. Y. & Curtin U.S. Dist. Judge Western Dist. [• • •] F-173
11	Filed Judgement that Sect. 661(3) of the N.Y. Education Law is unconstitutional etc. [• • •] F-173
Mar. 12	Filed Defts'. Notice of Appeal to the U.S. Supreme Court
12	Filed Defts'. Affidavit of Service of notice of appeal
Nov. 8	Filed certified copy of Order of U.S. Supreme Court noting probable jurisdiction Appeal
Dec. 23	Filed S.P. Application, Pltfs Exhibit "A" before the three Judge Court

Relevant Docket Entries in *Rabinovitch* v. *Nyquist, et al.*†

DATE	FILINGS—PROCEEDINGS	
8– 1–74	Complaint filed. Summons issued	1
8–26–74	ANSWER of N.U[Y.]. Higher Ed. Ass't. Corp, & Bd of Directors filed.	2
8–29–74	Summons returned & filed./Executed.	3
11–19–74	ANSWER filed.	6
2–14–75	Suggestion of death of David F. Merrall filed.	7
4– 9–75	Notice of motion ret 4-18-75 for certification of the action as a class action & for the designation of a three judge court filed.	8
4– 9–75	Affidavit of Gary J. Greenberg & brief in support of pltff's motion for class action, etc. filed.	9/10
4– 9–75	Affidavit of service re: notice of motion, Affidavit, & brief, filed.	11
4–18–75	Before JUDD, J.—Case called. Pltff's motion for a three judge court marked submitted. Decision reserved.	—
4–29–75	Deft's memorandum of law in opposition to motion for three-judge court filed.	12
5–22–75	Memorandum of Law for Deft. Nyquist filed.	13
5/23/75	By JUDD, J.—Memorandum and Order dated 5/23/75 filed that the motion for designation of a three judge court be granted. The court will	

† Additional defendants are not indicated hereafter.

DATE	FILINGS—PROCEEDINGS	
	notify the Chief Judge of the Circuit, and that the motion for a class action is denied. Copy of the Order sent to the parties.	14
5–30–75	Designation of Judges by CH. J. of C. of A. KAUFMAN that pursuant to 28 USC 2281 Judge Ellsworth Van-Graafeiland, US Cir. J., US C OF A (2nd Cir) and Judge John T. Curtin, USDJ for the Western Dist. of NY to serve in addition to Judge Orrin G. Judd, USDJ/EDNY in this action commencing 5-28-75 filed.	15
6– 6–75	Copy of an Order dtd 6-3-75 signed by J. Curtin, Dist. J. WDNY re schedule of briefs to be filed.	16
6– 6–75	Memorandum to J. Judd from J. Curtin (WDNY) filed.	17
6–23–75	Notice of motion ret 7-3-75 for an order authorizing pltff to serve and file an amended complaint filed.	18
6–26–75	Interrogatories filed.	19
7/ 1/75	Notice of Motion, ret. July 22, 1975 filed re: enjoin defts, etc.	(20)
7/ 1/75	Pltff's Affidavit in Support of Motion for Summary Judgment filed.	(21)
7/ 1/75	Pltff's Statement under Local Rule 9(g) filed	(22)
7/ 1/75	Brief in Support of Pltff's Motion for Summary Judgment filed.	(23)

DATE	FILINGS—PROCEEDINGS	
7– 3–75	Before JUDD, J.—Case called. Marked submitted. Decision reserved.	
7– 8–75	Interrogatories to defts filed.	(24)
7– 9–75	Before JUDD, J.—Memorandum and Order dtd 7-9-75 granting pltff leave to file an amended complaint etc filed. (p/c)	(25)
7–11–75	Amended complaint filed.	(26)
7–14–75	Deft NY Higher Education Assistance Corp. answers to interrogatories filed.	(27)
7–17–75	By JUDD, J.—Notice of hearing dtd 7-15-75 supplementing J. Curtin's order of June 3, 1975 that the hearing will take place in Ctrm. #11 on 7-22-75 at 2:10 p.m. filed.	(28)
7–21–75	Pltff's answer to interrogatories filed. ([C]opies mailed to judges[.][ ]	(29)
7–21–75	Pltff's reply memorandum filed.	(30)
7–21–75	Notice of motion and memorandum of law to dismiss complaint, ret 7-22-75 at 2:10 P.M. filed.	(31/32)
7–23–75	Before VAN GRAAFERLAND, C.J.: CURTIN, J.: JUDD, J.—Case called. Three judge court held on motions for summary judgment and defts motion to dismiss. Motions argued. Decision reserved on all motions.	
7–23–75	Defts memorandum of law filed.	(33)
7–23–75	Affidavit in opposition to motion for summary judgment filed.	(34)

Relevant Docket Entries in Rabinovitch v. Nyquist

DATE	FILINGS—PROCEEDINGS	
2–17–76	By VAN GRAAFEILAND, JUDD and CURTIN—DECISION & ORDER dtd 2-11-76 declaring Section 661(3) unconstitutional and defts are enjoined from its enforcement. Defts are directed to process pltff Mauclet's 1974-1975 tuition assistance application that was pending when he started this suit, and to requalify pltff Rabinowitz as a State regents scholarship recipient filed.	(35)
3– 9–76	Notice of appeal filed. Copy to Supreme Ct.	(36)
3–29–76	JUDGMENT dtd 3-26-76 (APPROVED BY VAN GRAAFEILAND, USCJ, JUDD, USDJ, and CURTIN, USDJ/WD NY) that the New York Education Law 661(3) is unconstitutional and the defts are enjoined from its enforcement etc filed.	(37)
3–30–76	Notice of appeal filed. Copy sent to Supreme Court.	(38)
4–14–76	Notice of appeal filed. (pltff)	39
5–28–76	Notice of appeal filed. Copies mailed to Supreme Ct. and pltffs (DEFTS) (MG)	(40)
6–11–76	ENTIRE FILE CERTIFIED AND MAILED TO THE SUPREME COURT, WASHINGTON c/o CLERK	(40)

Proceedings Before the Single District Judge in *Mauclet* v. *Nyquist*

Complaint.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Index No. Civ-75-73

JEAN-MARIE MAUCLET,

Plaintiff,

vs.

EWALD B. NYQUIST, Commissioner of Education of the State of New York,

Defendant.

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1. This is an action for a judgment declaring the invalidity of section 602(2) of the New York State Education Law on the grounds that it unconstitutionally discriminates against resident aliens and conflicts with the constitutional and congressional scheme of comprehensive national regulation of immigration and naturalization. The complaint also requests appropriate injunctive relief restraining the enforcement of this provision of the Education Law.

2. This complaint states claims under Article VI (the Supremacy Clause) and the Fourteenth Amendment of the United States Constitution, and 42 U.S.C. § 1983.

3. This court has jurisdiction under 28 U.S.C. §§ 1343 (3) and (4).

4. This action should be heard and decided by a district court of three judges in accordance with 28 U.S.C. § 2284.

5. Plaintiff Jean-Marie Mauclet is a citizen of France, a resident of New York State since April 22, 1969, a permanent resident of the United States since November 18, 1969, and a graduate student at the State University of New York at Buffalo. He is married to a citizen of the United States, and is the father of a United States citizen. Plaintiff began his graduate studies in September 1974 and expects to complete them in June 1976.

6. Defendant Ewald B. Nyquist is Commissioner of Education of the State of New York.

7. Article 13 of the Education Law of the State of New York establishes a tuition assistance program to provide, in accordance with a statutorily prescribed schedule of need, awards of up to $600 a year to undergraduate and graduate college students matriculated in state approved institutions and programs. Defendant Nyquist is responsible for the administration of the tuition assistance program.

8. Section 602(2) of the Education Law provides:

> "Citizenship. An applicant (a) must be a citizen of the United States, or (b) must have made application to become a citizen, or (c) if not qualified for citizenship, must submit a statement affirming intent to apply for United States citizenship as soon as he has the qualifications, and must apply as soon as eligible."

9. Plaintiff has submitted an application for a tuition assistance program award for the academic year 1974-75. He satisfies all requirements for an award except for the requirement governing citizenship. Although he is presently qualified to apply for citizenship and intends to reside permanently in the United States, he does not wish

to relinquish his French citizenship at this time. His pending application for a tuition assistance program award will not be processed by the State Department of Education until he files a Petition for Naturalization and provides the Department of Education with the date of filing and number of the petition.

10. Section 602(2) of the Education Law denies to resident aliens the equal protection of the laws guaranteed by the Fourteenth Amendment and 42 U.S.C. § 1983. It also conflicts with the constitutional and congressional scheme of comprehensive national regulation of immigration and naturalization.

11. Plaintiff will suffer irreparable harm unless section 602(2) of the Education Law is declared invalid and unless defendant Nyquist is enjoined from enforcing it and is ordered to resume processing plaintiff's application for a tuition assistance program award for the academic year 1974-75.

WHEREFORE, Plaintiff requests that this court:

(1) take jurisdiction of this matter and convene a statutory court of three judges pursuant to 28 U.S.C. §§ 2281 *et seq.;*

(2) issue a judgment declaring section 602 (2) of the Education Law invalid;

(3) enjoin defendant Nyquist from enforcing section 602(2) of the Education Law and order him to process plaintiff's application for a tuition assistance program award for the academic year 1974-75;

(4) award attorney fees and costs to plaintiff;

(5) grant such other and further relief as may be just and equitable.

Respectfully submitted,

KEVIN KENNEDY
Kevin Kennedy
1520 Genesee Building
Buffalo, New York 14202
716-856-9090

MICHAEL DAVIDSON
John Lord O'Brian Hall
State University of New York
Amherst Campus
Buffalo, New York 14260
716-636-2071

Decision and Order of John T. Curtin, District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

[SAME TITLE]

The plaintiff, a graduate student at the State University of New York at Buffalo, has been a resident of New York State since April 1969 and has been a permanent United States resident since November 1969. He is a French citizen.

Plaintiff challenges the constitutionality of New York Education Law § 602.2 on the grounds that it unconstitutionally discriminates against resident aliens and conflicts with the constitutional and congressional scheme of comprehensive national regulation of immigration and naturalization.[1] The plaintiff, who has submitted an application for a tuition assistance program award for the academic year 1974-75, satisfies all requirements for an award except for citizenship. He moves for the convening of a three-judge court and for declaratory and injunctive relief.

Defendant has moved to dismiss the complaint on the ground that plaintiff's claim is insubstantial. A claim is insubstantial only if frivolous or "if its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject." *Goosby* v. *Osser,* 409 U.S. 512, 518 (1973). Under this standard, defendant's motion to dismiss must be denied and plaintiff's motion to convene a three-judge court granted.

Alienage has been held to be a suspect classification. *See, e.g., Graham* v. *Richardson,* 403 U.S. 365 (1971). Statutes that treat aliens differently from citizens require a great degree of precision. *Sugarman* v. *Dougall,* 413 U.S. 634, 642 (1973) (New York flat statutory prohibition

against the employment of aliens in the competitive classified civil service unconstitutional). In *Jagnandin* v. *Giles,* 379 F. Supp. 1178 (N.D. Miss. 1974), a three-judge court invalidated a Mississippi statute which classified all alien students as non-residents for purposes of charging tuition and fees. A Virgin Islands law which barred non-citizen residents the right to participate in the Territorial Scholarship Fund solely by reason of their alienage was also held to be unconstitutional. *Chapman* v. *Gerard,* 456 F.2d 577 (3d Cir. 1972). The *Chapman* court discarded the argument, as have other courts, that participation in the scholarship fund is a privilege and not a right. *See also Shapiro* v. *Thompson,* 394 U.S. 618 (1969).

Applying the guidelines given in *Goosby* v. *Osser, supra,* and *Nieves* v. *Oswald,* 477 F.2d 1109 (2d Cir. 1973), the court finds that the complaint of the plaintiff does raise a substantial constitutional question within the meaning of the three-judge court statute.

Accordingly, the Honorable Chief Judge of the United States Court of Appeals for the Second Circuit is hereby requested to convene a three-judge court to hear and determine this cause.

So ordered.

JOHN T. CURTIN
United States District Judge

Dated: May 22, 1975.

FOOTNOTE

[1] Section 602.2 provides the following eligibility requirements and conditions governing awards:

> 2. Citizenship. An applicant (a) must be a citizen of the United States, or (b) must have made application to become a citizen, or (3) if not qualified for citizenship, must submit a statement affirming intent to apply for United States citizenship as soon as he has the qualifications, and must apply as soon as eligible.

(McKinney's Supp. 1975)

Proceedings Before the Single District Judge in *Rabinovitch* v. *Nyquist*

Complaint

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CLASS ACTION COMPLAINT

74 Civ. 1142

ALAN RABINOVITCH, on behalf of himself and on behalf of all others similarly situated; namely, all residents of New York State who have been or may be denied New York State Regents Scholarships, scholar incentive assistance awards and loans administered by the New York Higher Education Assistance Corporation solely on the basis of their status as aliens,

Plaintiffs,

against

EWALD B. NYQUIST, Commissioner of Education of the State of New York, THE UNIVERSITY OF THE STATE OF NEW YORK, THE BOARD OF REGENTS OF THE STATE OF NEW YORK, THE NEW YORK HIGHER EDUCATION ASSISTANCE CORPORATION and WILLARD C. ALLIS, DR. ERNEST BOYER, DR. JUDAH CAHN, WILMOT R. CRAIG, THOMAS P. DENN, WALTER A. KASSENBROCK, NORMA KERSHAW, REV. LAURENCE J. MCGINLEY, S.J., DAVID F. MERRALL, WILLIAM G. MORTON and RUSSEL N. SERVICE, being the members of the board of directors of said corporation,

Defendants.

Introductory Statement

1. This is a class action brought under the Fourteenth Amendment to the Constitution of the United States, the Supremacy Clause of the Constitution and federal statu-

tory provisions against Ewald B. Nyquist, Commissioner of Education, the University of the State of New York, the Board of Regents, the New York Higher Education Assistance Corporation and its Board of Directors. Plaintiff Alan Rabinovitch is a Canadian citizen and a resident alien lawfully admitted to permanent residence in the United States; he has been a resident of New York State since his arrival in the United States in 1964. The class he represents includes all lawfully admitted resident aliens residing in New York State who have been or may be denied New York State Regents Scholarships, scholar incentive assistance awards and loans administered by the New York Higher Education Assistance Corporation solely on the basis of their status as aliens. Plaintiffs challenge the provisions of Section 602(2) of New York's Education Law and Item 6 of the loan application of the New York Higher Education Assistance Corporation which preclude them from receiving Regents Scholarships, scholar incentive assistance awards, and student loans. This action is brought in the name of plaintiff Alan Rabinovitch who was denied a Regents Scholarship solely on the basis of his status as an alien.

Jurisdiction

2. Jurisdiction is premised on 28 U.S.C. §§ 1331(a), 1343(3), 2201 and 2202, the Fourteenth Amendment to the United States Constitution and Article VI (the Supremacy Clause) of the United States Constitution, in that (a) this is an action to recover damages and secure declaratory and injunctive relief to prevent the deprivation of rights, privileges and immunities secured to plaintiffs by the Constitution and by federal law and (b) the rights of each member of the plaintiff class at issue are valued in excess of $10,000, exclusive of interest and costs.

Three-Judge Court

3. Under 28 U.S.C. § 2281 a three-judge court is required to adjudicate this case because plaintiffs challenge the validity of a state statute and a state rule of general application on federal constitutional grounds. The state statute and state rule are of general application throughout New York State. In addition, a state officer is a party defendant; injunctive relief is sought; and a substantial federal constitutional issue is raised.

4. Plaintiffs hereby request that the Chief Judge of the United States Court of Appeals for the Second Circuit be notified pursuant to 28 U.S.C. § 2284 of the pendency of this action and of plaintiffs' demand for injunctive relief in order that the necessary designation of judges for the three-judge court can be made.

Venue

5. Plaintiff Alan Rabinovitch resides at 1468 East 89th Street, Brooklyn, New York, within the Eastern District of New York. Venue is based on the named plaintiff's residence.

Class Action Allegations

6. The named plaintiff brings this action in his own behalf and on behalf of all other persons similarly situated, pursuant to subsection (2) of Rule 23(b) of the Federal Rules of Civil Procedure.

7. The class which plaintiff represents constitutes all resident aliens lawfully admitted to permanent residence in the United States who (a) reside in the State of New

York; (b) have not acquired and do not intend to seek or apply for United States citizenship; and (c) are or may be otherwise entitled to Regents Scholarships, scholar incentive assistance awards and/or loans administered by the New York Higher Education Assistance Corporation.

8. The class is so numerous that joinder of all members is impracticable.

9. The class is affected by common questions of law and fact in that all who are otherwise qualified are denied Regents Scholarships, scholar incentive assistance awards and/or education loans pursuant to state law solely because of their status as aliens. The constitutional and statutory issues raised by the said denials of scholarships, awards and/or loans are precisely the same as regards each member of the class.

10. The named plaintiff's claims are typical of the claims of the class. His claim has a factual and legal basis substantially like those of other members of the class in that he was denied a Regents Scholarship solely because of his status as an alien.

11. The named plaintiff will fairly and adequately protect the interests of the class since he is a resident alien; his claims are co-extensive with those of the class; and he is represented in this action by counsel experienced in the conduct of similar litigation.

12. The defendants have acted and refused to act pursuant to state law with reference to the named plaintiff on grounds applicable to all members of the class by refusing to grant him a Regents Scholarship solely on the basis of his status as an alien.

Parties

13. Plaintiff Alan Rabinovitch, the named member of the class, lives at 1468 East 89th Street, Brooklyn, New York, and at all times relevant was and is a Canadian citizen lawfully admitted to the United States as a permanent resident alien. At all times herein relevant he was and is a resident of the United States and of the State of New York.

14. Defendant Ewald B. Nyquist is Commissioner of Education of the State of New York and as such is charged with the selection of scholarship recipients based on criteria and standards which, among other criteria and standards, are imposed by the New York Education Law, specifically by Section 602(2) of that law. More generally, as chief executive officer of the New York State system of education and of the Board of Regents of New York, he is charged pursuant to Section 305(1) of the Education Law with enforcement of all general and special laws relating to the educational system of the State.

15. Defendant University of the State of New York ("USNY") is a not for profit corporation duly incorporated in the State of New York. Pursuant to its charter and the powers vested in it by Sections 201 and 604 of the Education Law, as exercised by its agents, it is charged with the encouragement and promotion of education in New York State through the distribution and regulation of its corporate funds.

16. Defendant Board of Regents of the State of New York is a body created by state law. Pursuant to the powers granted to it by Section 604 of the Education Law, it is charged with creating the rules and procedures gov-

erning the application and qualification of candidates for Regents Scholarships and scholar incentive awards. More generally, the Board of Regents, pursuant to Section 202 of the Education Law, exercises all governing and corporate powers of defendant USNY.

17. Defendant New York Higher Education Assistance Corporation ("NYHEAC") is a not for profit corporation duly incorporated in the State of New York. Pursuant to its charter and the powers granted to it by Sections 650 and 651 of the Education Law, it is authorized to grant and guaranty student loans.

18. Defendants Willard C. Allis, Dr. Ernest Boyer, Dr. Judah Cahn, Wilmot R. Craig, Thomas P. Denn, Walter A. Kassenbrock, Norma Kershaw, Rev. Laurence J. McGinley, S.J., David F. Merrall, William G. Morton and Russel N. Service are all members of the board of directors of defendant NYHEAC and are here sued individually and in their capacities as directors of said corporation. (Defendant Nyquist serves, by virtue of his position as Commissioner of Education, as an ex officio member of the board of directors of NYHEAC.) The board of directors of NYHEAC is charged by Section 653 of the Education Law with the responsibility for the adoption of rules and regulations governing the application for and granting of loans made by said corporation.

Facts

19. As a result of the January 1973 Regents Qualifying Examinations, in or about April 1973, plaintiff Alan Rabinovitch was informed by defendants USNY and the Board of Regents that he was qualified and entitled to receive a Regents Scholarship and incentive assistance from the State of New York.

20. In or about May 1973, plaintiff Alan Rabinovitch received from defendants USNY and the Board of Regents forms relating to his family's financial status and an application for American citizenship. He completed and returned the financial forms but did not complete the citizenship application.

21. In or about September 1973, plaintiff Rabinovitch was advised that the offer of a Regents Scholarship had been withdrawn on the sole ground that, since he did not intend to become a citizen of the United States, Section 602 of the Education Law precluded his receipt of the Regents Scholarship. (A copy of said notice is annexed hereto as Exhibit A.)

22. The named plaintiff has been a permanent resident of the United States and of New York State since 1964. He is a product of the New York City public school system, having graduated from Bildersee Junior High School (J.H.S. #68) and Canarsie High School. He graduated from high school in June 1973. Since September 1973 he has been enrolled as a full time student at Brooklyn College majoring in psychology. As a result of the action of the defendants and because of New York State law, plaintiff Rabinovitch is attending Brooklyn College without the benefit of the Regents Scholarship to which he is entitled.

23. Upon his eighteenth birthday, some two years ago, plaintiff Rabinovitch registered with the Selective Service System at Local Board #38, 271 Cadman Plaza East, Brooklyn, New York. He and all members of his family have regularly paid federal, state and city income and excise taxes. Plaintiff Rabinovitch, by virtue of his status as a lawfully admitted resident alien residing in New York State, incurs all of the obligations and bears virtually all

of the responsibilities as are incurred and borne by citizens of the United States and New York State.

24. Plaintiff Rabinovitch and his entire family are Canadian citizens. It is plaintiff Rabinovitch's present intention to continue to reside in the United States and in New York State. However, he intends to retain his Canadian citizenship and does not intend to seek naturalization as an American citizen.

25. In January 1974 and again in March 1974, the attorneys for plaintiff Rabinovitch wrote to defendants' representatives requesting that he receive the scholarship funds to which he was entitled. Both of the letters brought forth a negative response. Defendants refused to award plaintiff Rabinovitch his Regents Scholarship or pay the funds due him solely because he was an alien and New York State law precluded the payment of scholarship monies to aliens.

First Claim for Relief

26. Defendants rely upon New York State Education Law, Section 602(2), for authority to impose the citizenship requirement upon the plaintiffs as a prerequisite to their receipt of Regents Scholarship and other scholar incentive assistance awards. The statute provides:

> "An applicant (a) must be a citizen of the United States, or (b) must have made application to become a citizen, or (c) if not qualified for citizenship must submit a statement affirming intent to apply for United States citizenship as soon as he has the qualifications and must apply as soon as eligible."

27. Defendants rely upon Item 6 of the Student's Application for Loan Guarantee form to deny plaintiffs loans

administered by NYHEAC. Item 6 provides:

> "When a student is not a U.S. Citizen or National a letter must be attached to the application by a student stating the type of visa that is held and a statement that it is the intention of the writer to become a citizen as soon as legally possible. Persons who are in this country on an "F" student visa or a visitors visa are not eligible for a loan."

(A copy of the form is attached hereto and denominated Exhibit B.)

28. Defendants under color of New York law, provide to certain persons residing within the jurisdiction of the State of New York Regents Scholarships, scholar incentive assistance awards and student loans, but deny these same benefits to other persons equally residing within the jurisdiction of New York State and equally qualified to receive such benefits solely on the basis that the latter class are aliens. In so acting defendants rely on the aforequoted statute and loan application criterion. Defendants have thereby created arbitrary classifications of persons before the law in violation of plaintiffs' rights to the equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution.

29. The aforequoted citizenship restrictions are beyond the powers under the Fourteenth Amendment to the United States Constitution of the New York State Legislature and NYHEAC to impose in that the said restrictions have no reasonable relationship to any interest which the Legislature or Corporation is constitutionally entitled to protect. The conclusive presumptions supporting the restrictions are not necessarily or universally true in fact. The citizenship restrictions are thus void as in violation of plaintiffs' guaranty to substantive due process of law

within the meaning of the Fourteenth Amendment to the United States Constitution.

30. The citizenship requirements contained in Section 602(2) of the Education Law and Item 6 of the NYHEAC loan application form are, under the Supremacy Clause of the United States Constitution, beyond the powers of the New York State Legislature and NYHEAC to impose in that said requirements unduly encroach on the exclusive power of the federal government to regulate immigration and alien residence, since they impose significant burdens upon aliens lawfully admitted to permanent residence within the United States and cause such individuals to suffer an unlawful handicap and discrimination after lawful entry to the United States without the sanction of federal law in direct contravention of federal policy any constitutional power.

31. Insofar as Item 6 of the NYHEAC loan application form exceeds the requirements proscribed by 45 C.F.R. § 177.2 it is void as contrary to federal regulation.

Second Claim for Relief

32. By reason of the actions of the named plaintiff and his attorneys, especially the prosecution of this litigation, which actions have been in the public interest and for the benefit of the plaintiff class, the attorneys for plaintiff Rabinovitch and the class he represents are entitled to an award of reasonable counsel fees from defendants to compensate them for their time, effort, initiative and service on behalf of the public interest and the plaintiff class.

WHEREFORE, plaintiff Alan Rabinovitch and the plaintiff class which he represents, pray for an order of this Court:

1. Declaring that New York Education Law Section 602(2) and Item 6 of the NYHEAC loan application form

are unconstitutional and null and void and are of no legal force and effect; or, in the alternative, declaring that the said Item 6 is void as contrary to federal regulation as prescribed in 45 C.F.R. § 177.2.

2. Permanently enjoining defendants from (a) enforcing Section 602(2) of the Education Law and Item 6 of the NYHEAC loan application form and (b) refusing to grant Regents Scholarships, scholar incentive assistance awards and loans administered by NYHEAC to any applicant on the ground that, though a resident alien living in New York State, the applicant is not a United States citizen and does not intend to acquire citizenship status.

3. Requiring that defendants strike all references to the citizenship requirement from their application forms, brochures, literature and the like and requiring that defendants take affirmative action to overcome the effects of their past practices by giving notice to the public, especially high school, college and graduate students, indicating that resident aliens are eligible for Regents Scholarships, scholar incentive assistance awards and student loans.

4. Directing that defendants forthwith process, without regard to the provisions of Section 602(2) of the Education Law and Item 6 of the NYHEAC loan application, the applications for Regents Scholarships, scholar incentive assistance awards and NYHEAC loans filed by the named plaintiff and by all members of the plaintiff class who, subsequent to June 14, 1971, filed such applications which were denied on the sole ground that the applicant was an alien.

5. Directing the defendants to pay plaintiff Alan Rabinovitch the amount of money to which he was entitled under the Regents Scholarship program for the 1973-74 school year plus interest.

6. Directing the defendants to pay all members of the plaintiff class as identified pursuant to paragraph 4 above, the amount of money each was entitled to under the Regents Scholarship and scholar incentive assistance award programs for each school year beginning with the 1971-72 school year plus interest.

7. Awarding the attorneys for plaintiff Rabinovitch and the plaintiff class reasonable attorneys fees as fixed by the court to be paid by defendants.

8. Granting the named plaintiff the costs of this action and such other and further relief as to the Court may seem just and proper in the premises.

Dated: New York, New York, August 1, 1974.

STROOCK & STROOCK & LAVAN
GARY J. GREENBERG
STEPHEN BLOCK
61 Broadway
New York, New York 10006
425-5200

BURT NEUBORNE
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION INC.
22 East 40th Street
New York, New York 10016

By GARY J. GREENBERG
Attorneys for Plaintiffs

Letter from Loretta Picarillo to Mrs. Leo Rabinovitch, Exhibit "A" to Complaint

THE UNIVERSITY OF THE STATE OF NEW YORK
THE STATE EDUCATION DEPARTMENT

REGENTS EXAMINATION AND SCHOLARSHIP CENTER
STUDENT FINANCIAL AID SECTION
99 Washington Avenue
Albany, New York 12210

September 19, 1973

Mrs. Leo Rabinovitch
1468 East 89th Street
Brooklyn, New York 11236

Re: 73-RC-5763
Alan Rabinovitch

Dear Mrs. Rabinovitch:

Your recent letter to this Center regarding Alan's Regents College Scholarship and his citizen status, has been referred to me for reply.

I am sorry to advise you that it is necessary that we withdraw the offer of a Scholarship, since you indicate Alan does not intend to become a citizen of the United States. The Scholarship will be reawarded to the next alternate on the list who must also meet the citizenship requirements.

The law governing eligibility requirements for awards requires that an applicant for financial assistance (if not a citizen of the United States), must apply for citizenship, if he is eligible to do so.

If I can be of any further assistance, please do not hesitate to contact me. In all future correspondence, please refer to Alan's identification number above.

Very truly yours,

Loretta Picarillo
LORETTA PICARILLO (Mrs.)

LP:dd

Student's Application for Loan Guarantee, Exhibit "B" to Complaint (Excerpts)

NEW YORK HIGHER EDUCATION CORPORATION
50 Wolf Road Albany, New York 12205

STUDENT'S APPLICATION FOR LOAN GUARANTEE

• • •

I. INSTRUCTIONS FOR ROUTING OF APPLICATION FORM

1. Student submits completed application in triplicate to Educational Institution.

2. Educational Institution completes Part B and forwards the application in duplicate to the Lender or the Student.

3. Lender, selected by the Student, receives the application from the Educational Institution or from the Student, reviews the information submitted, consults with Student concerning repayment of the loan, makes recommendation and forwards application to NYHEAC.

4. NYHEAC notifies Student, Lender and Educational Institution of loan disposition.

II. INSTRUCTIONS FOR COMPLETING PART A—IDENTIFICATION DATA

Clarification of Specific Items in Part A:

• • •

Item 6: When a student is not a U.S. Citizen or National a letter must be attached to the application by a student stating the type of visa that is held and a statement that it is the intention of the writer to become a citizen as soon as legally possible. Persons who are in this country on an "F" student visa or a visitors visa are not eligible for a loan.

• • •

Application for Loan Guarantee, Exhibit "B" to Complaint.

Item 8: When a student is supporting anyone other than his children the box after "Other" should indicate the number of dependents or additional dependents and an explanation is required, for example, mother, father, in-laws.

• • •

Item 22: When a student is employed it is necessary that he check whether he is employed on a full or part-time basis.

Item 23: When the student's spouse is also a student and employed the same information is required.

Item 26: Statement of Adjusted Family Income—When a student is currently living with parents or a parent or has lived with them at any time during the preceding 12 month period, the parents income must be indicated and must be considered even if the student is paying room and board and regardless of the student's age.

In determining if the student has been a recipient of an amount in excess of $600 from one or both parents, loans from the parents must be included.

Item 26A & B: These [adjusted gross income of parents and/or student] are figures for the immediately preceding tax year. Refer to your last income tax return and indicate exact amounts.

Item 26D: Permits only 10% of the amount of adjusted gross income even though on your tax return you may have had a larger deduction.

Item 26E: From the Federal tax return you filed you will clearly see the dollar amount that was permitted to be deducted.

Item 27: "Home Equity" is your estimate of the current market value of your home minus whatever mortgage amount is still outstanding.

Item 32: "Non-taxable income" under this item include social security, G.I. Benefits, Aid to Dependent Children, Welfare payments or any other non-taxable items.

Items 36 & 37: If you have any information to provide concerning either of these items [Additional Educational Expenses and Extraordinary Family Expenses and situations], please do so in a letter made out in triplicate so that one copy is attached to each of these completed forms.

Items 47 & 48: "Credit and Character References" must be responsible employed individuals who have known you for a period of time and who would be able to provide information concerning character as well as knowing something about your credit potential. This is an application for a loan and you are agreeing to repay the loan plus interest.

Before your parents sign this form be sure they read the certification and note that the student should not sign the form except in the presence of a notary where he will swear to the complete statement concerning the application.

III. General Instructions

To qualify for a loan, a student must have a sincere sense of responsibility toward repayment of a loan and must be:

1. A bona fide resident of New York State for one year prior to submitting an application. (A student who resides in New York solely for the purpose of attending school is not eligible for a loan.)

2. Enrolled in or accepted for admittance as a full-time student at an approved college or an approved vocational school.

A. Eligibility for interest benefits is determined by the school following an approved needs method which will take into account a) adjusted family income, b) family assets, number of children in school and total number of dependents. If you do not wish to have the school do a "needs" determination and are willing to pay interest during the time you are in school, in Part B please write over the printing in Section III, "Not applying for Federal Interest Benefits" and sign your name. However, Sections I and II must be completed.

B. It is the responsibility of the student and his family to provide the educational institution with all pertinent information and any additional educational expenses depending on the number of children attending various types of schools as well as extraordinary circumstances attending the family, if any.

• • •

Answer of New York Higher Education Assistance Corporation

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

The defendants, The New York Higher Education Assistance Corporation and Willard C. Allis, Dr. Ernest Boyer, Dr. Judah Cahn, Wilmot R. Craig, Thomas P. Denn, Walter A. Kassenbrock, Norma Kershaw, Rev. Laurence J. McGinley, S.J., David F. Merrall, William G. Morton and Russell N. Service, being the members of the board of directors of said corporation, answering the complaint:

FIRST: Deny knowledge or information sufficient to form a belief as to the allegations, and each of them contained in the paragraphs thereof designated "1", "2", "3", "5", "7", "9", "10", "11", "12", "13", "19", "20", "21", "22", "23" and "24".

SECOND: Deny the allegations, and each of them contained in the paragraphs thereof designated "8", "25", "26", "28", "29", "30", "31" and "32".

WHEREFORE, these defendants demand judgment dismissing the complaint as to them with costs.

McNAMEE, LOCHNER, TITUS & WILLIAMS, P.C.
75 State Street
Albany, New York 12201
Tel. 518 434 3136

Answer of New York Higher Education Assistance Corporation

By: Earl H. Gallup, Jr.
Attorneys for Defendants, The New York Higher Education Assistance Corporation, and Willard C. Allis, Dr. Ernest Boyer, Dr. Judah Cahn, Wilmot R. Craig, Thomas P. Denn, Walter A. Kassenbrock, Norma Kershaw, Rev. Laurence J. McGinley, S.J., David F. Merrall, William G. Morton and Russell N. Service, being the members of the board of directors of said corporation.

CULLEN & DYKMAN
177 Montague Street
Brooklyn, New York
11201
Tel. 855 9000
Of Counsel

Answer of Nyquist, the University of the State of New York and the Board of Regents of the State of New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

Defendants, Ewald B. Nyquist, Commissioner of Education of the State of New York, The University of State of New York and the Board of Regents of the State of New York, answering the complaint herein by their attorney, Louis J. Lefkowitz, Attorney General of the State of New York, respectfully allege:

FIRST: Deny knowledge or information sufficient to form a belief as to each and every allegation in paragraph "1" except admit that plaintiffs purport to bring this action under the Fourteenth Amendment to the Constitution of the United States, the Supremacy Clause of the Constitution and federal statutory provisions against Ewald B. Nyquist, Commissioner of Education, the University of the State of New York, the Board of Regents, the New York Higher Education Assistance Corporation and its Board of Directors, that plaintiffs define said class as all those lawfully admitted resident aliens residing in New York State who have been or may be denied New York State Regents Scholarships, scholar incentive assistance awards and loans administered by the New York Higher Assistance Corporation solely on the basis of their status as aliens, that plaintiffs challenge the provisions of Section 602(2) of New York's Education Law and Item 6 of the loan application of the New York Higher Education Assistance Corporation which preclude them from receiving

Regents Scholarships, scholar incentive assistance awards, and student loans, and that this action is brought in the name of plaintiff Alan Rabinovitch who was denied a Regents Scholarship solely on the basis of his status as an alien.

SECOND: Deny each and every allegation in paragraph "2" insofar as said paragraph alleges that 28 U.S.C. §§ 1331(a), 1343(3), 2201 and 2202, the Fourteenth Amendment to the United States Constitution and Article VI (the Supremacy Clause) of the United States Constitution provide a basis for the Court's jurisdiction except deny information or knowledge sufficient to form a belief as to whether the rights of each member of the purported plaintiff class at issue are valued in excess of $10,000, exclusive of interest and costs and admit that plaintiffs bring this action to recover damages and secure declaratory and injunctive relief to prevent what they allege is the deprivation of rights, privileges and immunities secured to plaintiffs by the Constitution and by federal law.

THIRD: Deny each and every allegation in paragraph "3" insofar as said paragraph alleges that a three-judge court is required to adjudicate this case because a substantial federal constitutional issue is raised.

FOURTH: Deny each and every allegation in paragraph "4" insofar as that paragraph is based on the allegation that a three-judge court must be convened.

FIFTH: Deny each and every allegation in paragraphs "6" and "7" insofar as those paragraphs allege that a class action may be maintained in this case.

SIXTH: Deny each and every allegation in paragraph "8".

SEVENTH: Deny each and every allegation in paragraph "9" except admit that Regents Scholarships and scholar incentive assistance awards are denied unless an applicant is a citizen, has made application for citizenship or intends to apply for citizenship if eligible and lack knowledge or information sufficient to form a belief about education loans.

EIGHTH: Deny each and every allegation in paragraph "10" except admit that the named plaintiff was denied a Regents Scholarship because he is not a citizen, has not made an application for citizenship and does not intend to apply for citizenship.

NINTH: Deny knowledge or information sufficient to form a belief as to each and every allegation in paragraph "11".

TENTH: Deny each and every allegation in paragraph "12" except admit that state defendants, pursuant to state law, have refused to grant plaintiffs a Regents Scholarship because he is neither a citizen nor has he made application for citizenship nor does he intend to apply for citizenship.

ELEVENTH: Deny knowledge or information sufficient to form a belief as to each and every allegation in paragraph "13" except admit that plaintiff Alan Rabinovitch lives at 1468 East 89th Street, Brooklyn, New York.

TWELFTH: With respect to paragraph "14" admit that defendant Ewald B. Nyquist is Commissioner of Education of the State of New York and chief executive officer of the New York State system of education and of the Board of Regents of New York and that the New York Education Law § 602(2) relates to the selection of Scholarship

recipients and that § 305(1) relates to the enforcement of all general and special laws relating to the educational system of the State but respectfully refer the Court to the complete text of those sections.

THIRTEENTH: With respect to paragraph "15" admit that defendant University of the State of New York ("USNY") is a not for profit corporation duly corporated in the State of New York and that the Education Law, §§ 201 and 604 relate to its duty and that of its agents to encourage and promote education in New York State through the distribution and regulation of its corporate funds but respectfully refer the court to the complete text of those sections.

FOURTEENTH: With respect to paragraph "16" admit that defendant Board of Regents of the State of New York is a body created by state law and admit that the Education Law, § 604 relates to the Board's creating rules and procedures governing the application and qualification of candidates for Regents Scholarships and scholar incentive awards but respectfully refer the court to the complete text of said section and admit that the Education Law, § 202 relates to the Board's exercise of the governing and corporate powers of defendant USNY but respectfully refer the Court to the complete text of said section.

FIFTEENTH: Deny knowledge or information sufficient to form a belief as to each and every allegation in paragraphs "17" and "18", and respectfully refer the Court to the answer of those defendants.

SIXTEENTH: Deny knowledge or information sufficient to form a belief as to each and every allegation in paragraphs "19", "20", "22", "23", "24" and "27".

SEVENTEENTH: Admit each and every allegation in paragraph '25" except deny that defendants refused to award plaintiff Rabinovitch his Regents Scholarship or pay the funds due him solely because he was an alien because defendants refused to award plaintiff a scholarship because he failed to comply with Education Law § 602(2).

EIGHTEENTH: Admit each and every allegation in paragraph "28" except deny knowledge or information sufficient to form a belief as to loan application criterion and deny that such benefits are denied on the basis that some persons are aliens insofar as defendants grant scholarships to aliens, otherwise qualified who have made application for citizenship or file a statement of intent to make such application when eligible and deny that defendants have thereby created arbitrary classifications of persons before the law and in violation of plaintiffs' rights to the equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution.

NINETEENTH: Deny each and every allegation in paragraphs "29" and "30" except deny knowledge or information sufficient to form a belief as to item 6 of the NYHEAC loan application form and respectfully refer the Court to the answer of the defendant NYHEAC.

TWENTIETH: Deny knowledge and information sufficient to form a belief as to each and every allegation in paragraph "31".

TWENTY-FIRST: Deny each and every allegation in paragraph "32".

AS AND FOR A FIRST SEPARATE AND DISTINCT DEFENSE, THE STATE DEFENDANTS ALLEGE:

TWENTY-SECOND: The court lacks jurisdiction over the subject matter.

AS AND FOR A SECOND SEPARATE AND DISTINCT DEFENSE, THE STATE DEFENDANTS ALLEGE:

TWENTY-THIRD: The complaint fails to state a cause of action upon which relief can be granted.

AS AND FOR A THIRD SEPARATE AND DISTINCT DEFENSE, THE STATE DEFENDANTS ALLEGE:

TWENTY-FOURTH: The Education Law § 602(2) complies with the Supremacy Clause of the United States Constitution.

AS AND FOR A FOURTH SEPARATE AND DISTINCT DEFENSE, THE STATE DEFENDANTS ALLEGE:

TWENTY-FIFTH: The Education Law § 602(2) complies with the Fourteenth Amendment to the United States Constitution.

AS AND FOR A FIFTH SEPARATE AND DISTINCT DEFENSE, THE STATE DEFENDANTS ALLEGE:

TWENTY-SIXTH: The defendants, the University of the State of New York and the Board of Regents of the State of New York are not persons within the meaning of the Civil Rights Act and therefore are not amenable to suit under that act.

Answer of Nyquist, USNY and the Board of Regents

WHEREFORE, State defendants pray for judgment in their favor dismissing the action and awarding them costs, or, in the alternative, a declaration that Education Law, § 602(2) is constitutional.

Dated: New York, New York
October 11, 1974

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants
Ewald B. Nyquist, The University of State of the State of New York and The Board of Regents

By
/s/ JUDITH A. GORDON
JUDITH A. GORDON
Assistant Attorney General
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-7400

Memorandum and Order of Orrin G. Judd, District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

Dated: May 23, 1975

Appearances:

STROOCK & STROOCK & LAVAN, Esqs.
Attorneys for Plaintiff

By: GARY J. GREENBERG, Esq.
GREGORY K. MARKS, Esq.
of Counsel

HON. LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Attorney for Defendant Ewald B. Nyquist

By: ROBERT S. HAMMER, Esq.
Assistant Attorney General
of Counsel

MCNAMEE, LOCHNER, TITUS & WILLIAMS, P.C.

By: EARL H. GALLUP, JR., Esq.
of Counsel
and
CULLEN & DYKMAN, Esqs.
Attorneys for Defendants New York Higher Education Assistance Corporation, et al.

Memorandum and Order of Orrin G. Judd, District Judge

JUDD, J.

Memorandum and Order

Plaintiffs have moved for the convening of a three-judge court and for certification of the case as a class action.

Facts

The complaint seeks injunctive relief against Section 602(2) of the New York Education Law. Plaintiff's attack is based on the claim that he was disqualified for a New York State Regents Scholarship although he won a competitive test, because he is an alien who does not intend to apply for American citizenship. Plaintiff has been lawfully admitted to permanent residence within the United States and has resided in New York since 1964.

The claim for class action certification is based on the assertion that plaintiff knows five individuals who have been denied educational assistance funds because of their status as aliens and that the census figures indicate that there may be as many as 200,000 resident aliens who might seek the benefit of the statutes under attack.

Discussion

1. Jurisdiction of the action exists under 28 U.S.C. § 1343(3), without the necessity of establishing the jurisdictional amount of $10,000. *Hagans* v. *Lavine,* 415 U.S. 528, 535-36, 94 S.Ct. 1372, 1380 (1974).

2. In determining the necessity for a three-judge court, the issue is whether plaintiff's claim is "wholly insubstantial," *Bailey* v. *Patterson,* 369 U.S. 31, 33, 82 S.Ct. 594, 551 (1962), or whether "its unsoundness so obviously results from previous decisions of [the Supreme Court] as

Memorandum and Order of Orrin G. Judd, District Judge

to foreclose the subject." *Ex parte Poresky,* 290 U.S. 30, 32, 54 S.Ct. 3, 4 (1933). See also *Goosby* v. *Osser,* 409 U.S. 512, 518, 93 S.Ct. 854, 858 (1973); *Rosenthal* v. *Board of Education,* 497 F.2d 726 (2d Cir. 1974).

The United States Supreme Court has recently held that alienage is not a valid reason for states to deny various benefits to persons.

In *Graham* v. *Richardson,* 403 U.S. 365, 91 S.Ct. 1848 (1971), the court struck down state statutes barring noncitizens or, in one case, those who had not been residents for fifteen years, from categorical assistance. It held that "classifications based on alienage, like those based on nationality, or race, are inherently suspect and subject to close judicial scrutiny." 403 U.S. at 372, 91 S.Ct. at 1852. It expressly rejected the argument that the "special public interest," *i.e.,* the "State's desire to preserve limited welfare benefits for its own citizens," justified restricting benefits to citizens and longtime residents. The court also suggested that such state statutes conflict with the "complete scheme of regulation" governing the qualifications for entry and status of immigrants which the federal government has enacted pursuant to its constitutional authority. 403 U.S. at 378, 91 S.Ct. at 1855.

In *Sugarman* v. *Dougall,* 413 U.S. 634, 93 S.Ct. 2844 (1973), the court voided a New York law barring noncitizens from permanent competitive positions in the state civil service, even though the "record does not disclose that any of the four appellees ever took any steps to attain United States citizenship." 413 U.S. at 638, 93 S.Ct. at 2845. Though the holding rested somewhat on the fact that the classification was both over and underinclusive with regard to the purported state purpose of limiting government service to those fully aware of American mores, the court cited *Graham* and basically decided that the state had failed to advance a forceful reason for employing a sus-

pect classification. 413 U.S. at 642-46, 93 S.Ct. at 2848-49. It noted the various obligations of membership in the political community which resident aliens fulfill, and replied to the argument that resident aliens are more likely to leave the state at some time by quoting the lower court's view that the state would be "hard pressed to demonstrate that a permanent resident alien who has resided in New York or the surrounding area for a number of years . . . would be a poorer risk for a career position in New York . . . than an American citizen." 413 U.S. at 645, 93 S.Ct. 2849, quoting 339 F. Supp. 906, 909.

In *In re Griffiths,* 413 U.S. 717, 93 S.Ct. 2851 (1973), the court invalidated a Connecticut statute which disqualified even permanent resident aliens from membership in the bar. It said that "Resident aliens, like citizens, pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society. It is appropriate that a State bear a heavy burden when it deprives them of employment opportunities." 413 U.S. at 722, 93 S.Ct. at 2855. The court found that the state had not proffered any persuasive justification.

The Supreme Court now has before it three cases bearing on the issues in this case. In *Mow Sun Wong* v. *Hampton,* 500 F.2d 1031 (9th Cir. 1974), *cert. granted,* 94 S.Ct. 3067, the lower court voided as violative of due process a regulation of the United States Civil Service Commission barring non-citizens from competitive positions. In *Weinberger* v. *Diaz,* 361 F. Supp. 1 (S.D. Fla. 1973) (three-judge court), *prob. juris. noted,* 94 S.Ct. 2381 (1974), the lower court invalidated the exclusion of aliens who have not been continuous residents for five years from a supplemental medical insurance plan enacted as part of Medicare. And in *Ramos* v. *United States Civil Service Commission,* 376 F. Supp. 361 (D. P.R. 1974) (three-judge court), appeal filed August 30, 1974, No. 74-216, the lower

court held, after *Sugarman,* that the federal government could not exclude resident aliens from civil service employment or from eligibility for federal disaster relief loans.

The New York statute in question here was sustained by a state court in *Friedler* v. *University of New York,* 70 Misc.2d 444, 333 N.Y.S.2d 928 (Sup. Ct. Erie Co. 1972). This decision predated all the Supreme Court cases outlined above, except for *Graham,* which was not cited. It does not oblige this court to view plaintiffs' claim as "wholly insubstantial."

The issue in the case at bar was not decided in *Spatt* v. *New York,* 361 F. Supp. 1048 (E.D.N.Y. 1973), *aff'd,* 94 S.Ct. 563 (1973), which merely upheld the requirement that Regents Scholarships be used at institutions within New York State. That case did not involve alienage, was decided on the "rational basis" test, and depended on specific purposes advanced by the state in support of the particular law.

No United States Supreme Court case has decided the effect of alienage on the right to public grants for higher education. In light of the Supreme Court cases outlined above, the basic issue in this case may be whether there is something about Regents Scholarships which sufficiently differentiates them from licensure in a profession, or eligibility for civil service employment, or public assistance, so that a state's discrimination against aliens would be permissible. It may be that scholarships are less vital to existence than a job or welfare grants, or it may be that the state can cite some compelling purpose which the classification advances. But the Supreme Court cases cited above, far from foreclosing a challenge to this statute, provide an array of philosophical and practical arguments militating against the constitutionality of this type of classification. It is therefore necessary to request the

Memorandum and Order of Orrin G. Judd, District Judge

convening of a three-judge court, pursuant to 28 U.S.C. § 2281.

Plaintiffs' proposed amendment of the complaint to refer to the modified New York statute (L. 1974, c. 942) will not affect the conclusion in this memorandum.

3. The motion for class action status is based on the assertion that the class is a large one, but gives little attention to the requirement of F.R.Civ.P. 23(b)(3) that the court find that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Apart from the fact that four students in the Buffalo area have brought actions attacking the statute within the last three years, the only evidence of the size of the class is based on estimates from census figures.

Certifying the matter as a class action requires some identification of the members of the class and provision for notice at the expense of plaintiffs. *Eisen* v. *Carlyle,* 417 U.S. 156, 94 S.Ct. 2140 (1974). Class action procedure is therefore a cumbersome method, which is not particularly helpful where the issue is one of the constitutionality of a statute. Any decision of the legal issues in this case will have *stare decisis* effect, even more so if this case is consolidated with the case pending before Judge Curtin in the Western District of New York. *Mauclet* v. *Nyquist,* Civ. 75-73. The plaintiff in this case will not graduate until mid-1977. It is probable that the case will be decided on the merits before then. In this case no real necessity has been shown for treating the case as a class action.

It is Ordered that the motion for the designation of a three-judge court be granted. The court will notify the Chief Judge of the Circuit.

It is further Ordered that the motion for class action status be denied.

Orrin G. Judd
U. S. D. J.

Proceedings Before the Three-Judge Court for the Western and Eastern Districts of New York in *Mauclet* v. *Nyquist* and *Rabinovitch* v. *Nyquist*

Order directing that *Mauclet* v. *Nyquist* and *Rabinovitch* v. *Nyquist* be heard together

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Civ-75-73

JEAN-MARIE MAUCLET,

Plaintiff,

—VS—

EWALD B. NYQUIST, Commissioner of Education of the State of New York,

Defendant.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

74-C-1142

ALAN RABINOVITCH, on behalf of himself and on behalf of all others similarly situated; namely, all residents of New York State who have been or may be denied New York State Regents Scholarships, etc.,

Plaintiffs,

—against—

EWALD B. NYQUIST, Commissioner of Education of the State of New York, THE UNIVERSITY OF THE STATE OF NEW YORK, et al.,

Defendants.

Order on Hearing

These cases will be heard together on July 22, 1975 in New York City, the exact location not yet determined.

Briefs in these cases shall be submitted on the following schedule. Plaintiffs' briefs shall be filed not later than Friday, June 27, 1975. Defendants' responses shall be filed not later than Monday, July 14, 1975. Any reply briefs shall be received no later than Friday, July 18, 1975. A copy of each brief shall be forwarded to each judge on the panel.

So ordered.

JOHN T. CURTIN
John T. Curtin
United States District Judge

Dated: June 3, 1975.

Motion to Amend Complaint and for Summary Judgment on Behalf of Jean-Marie Mauclet

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Civ-75-73

JEAN-MARIE MAUCLET,
Plaintiff,

—vs—

EWALD B. NYQUIST, Commissioner of Education of the State of New York,
Defendant.

Please take notice that plaintiff will move this Court on July 22, 1975, in New York, New York, at a time and place to be designated by the Court, for orders:

1. Granting, pursuant to Rule 15 of the Federal Rules of Civil Procedure, leave to amend the complaint by

a) adding as a party defendant the New York State Higher Education Services Corporation, an educational corporation within the Department of Education, which, on July 1, 1975, succeeds to the powers of the Commissioner of Education in the administration of student financial aid programs, and

b) amending paragraphs one (1) and eight (8) of the body of the complaint, and paragraphs two (2) and three (3) of the "wherefore" clause of the complaint, to show that as of July 1, 1975, that section 602(2) of the Education Law has been renumbered and reenacted verbatim as section 661(3) of the Edu-

cation Law, and that plaintiff seeks a judgment invalidating both sections 602(2) and 661(3) of the Education Law;

2. Granting, pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, summary judgment declaring the unconstitutionality of sections 602(2) and 661(3) of the Education Law and ordering the Commissioner of Education or the New York State Higher Education Services Corporation, whichever may be appropriate, to process plaintiff's pending application for a tuition assistance program award for the academic year 1974-75.

This motion is supported by an affidavit of the plaintiff, Jean-Marie Mauclet, and a memorandum of law.

Dated: June 20, 1975.

Respectfully submitted,

Kevin Kennedy
1520 Genesee Building
Buffalo, New York

Michael Davidson
John Lord O'Brian Hall
State University of New York
Amherst Campus
Buffalo, New York 14260

Attorneys for Plaintiff

To: Douglas Cream
Assistant Attorney General
65 Court Street
Buffalo, New York 14202

Affidavit of Jean-Marie Mauclet in Support of Motion for Summary Judgment

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF ERIE } ss.:

JEAN-MARIE MAUCLET, being duly sworn, deposes and says:

1. I am the plaintiff in the above entitled action and I submit this affidavit in support of my motion for summary judgment.

2. I am a French citizen.

3. I have been a resident of New York State since April 22, 1969, and a permanent resident of the United States since November 18, 1969.

4. I am married to a United States citizen, and our child is a United States citizen.

5. I am a graduate student at the State University of New York at Buffalo. I began my graduate studies in September, 1974 and I expect to complete them in June, 1976.

6. At the end of July 1974, I submitted a timely application, pursuant to Article 13 of the Education Law, for a tuition assistance program award for the academic year 1974-75. I applied for, and believe that I am entitled to, the maximum award of $600 for the academic year 1974-75.

7. I satisfy all requirements for a maximum award except the requirement of citizenship.

8. Although I am presently qualified to apply for citizenship and intend to reside permanently in the United States, I do not wish to relinquish my French citizenship at this time.

9. I have been informed by the State Education Department that my application for a tuition assistance program award will not be processed until I file a Petition for Naturalization and provide the Department of Education with the date of filing and number of the petition.

10. The State University of New York has established a scholarship program known as the State University Scholarship Fund to assist full-time students, including graduate students, at the State University. Under this program, scholarships are provided to students who are eligible for the maximum tuition assistance program authorized by the Education Law. A student who is eligible for scholarship assistance is entitled to receive, in addition to a tuition assistance program award, the difference between the full amount of his tuition and the amount of his tuition assistance program award. The total of these two kinds of tuition assistance amounts to a full tuition scholarship.

11. My tuition for the academic year 1974-75 was $1200. If I had been eligible to receive a tuition assistance program award of $600, I would have been entitled to receive a State University Scholarship of $600. The citizenship requirement of the Education Law serves to render me ineligible both for a tuition assistance program award and a State University Scholarship.

12. At the beginning of the 1974-75 academic year I applied for and received a student loan from the Erie County

Savings Bank in the amount of $2500. This loan is guaranteed by the New York Higher Education Assistance Corporation. The proceeds of the loan were paid to me through the Bursar of the State University of New York who deducted $651.20 from the full amount of the loan and paid $1848.80 to me. The deduction of $651.20 included $600 for payment of half my tuition charges for the academic year. The other half of my tuition charges I subsequently paid under protest out of my student loan funds. Additionally, I now owe the Erie County Savings Bank $2500, the full amount of my student loan, and I am obligated to begin repaying this loan when I complete my studies.

13. On information and belief, French and United States citizens are treated alike in French universities. There are no tuition charges in French universities, and the right to attend a university free of charge is a right enjoyed by United States citizens as well as French citizens.

WHEREFORE, plaintiff requests that a judgment be entered declaring sections 602(2) and 661(3) of the Education Law invalid, providing appropriate injunctive relief to require defendants to complete the processing of plaintiff's pending application for a tuition assistance program for the academic year 1974-75, and retaining jurisdiction to consider applications for any further orders which may be necessary to secure complete relief.

(Sworn to by Jean-Marie Mauclet on June 20, 1975.)

Amended Complaint in *Rabinovitch* v. *Nyquist* (Excerpts)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

74 Civ. 1142 (OGJ)

ALAN RABINOVITCH,

Plaintiff,

—against—

EWALD B. NYQUIST, Commissioner of Education of the State of New York, THE UNIVERSITY OF THE STATE OF NEW YORK, THE BOARD OF REGENTS OF THE STATE OF NEW YORK, THE NEW YORK STATE HIGHER EDUCATION SERVICES CORPORATION and the NINE INDIVIDUAL MEMBERS OF THE BOARD OF TRUSTEES OF SAID CORPORATION, namely DOES I through VI and *ex officio* EWALD B. NYQUIST, ERNEST L. BOYER and ROBERT J. KIBBEE and the PRESIDENT OF SAID CORPORATION (the unnamed individuals being unknown to plaintiff),

Defendants.

Introductory Statement

1. This is an action brought under the Fourteenth Amendment to the Constitution of the United States, the Supremacy Clause of the Constitution and federal statutory provisions against Ewald B. Nyquist, Commissioner of Education, the University of the State of New York, the Board of Regents, the New York State Higher Education Services Corporation and its Board of Trustees and President. Plaintiff Alan Rabinovitch is a Canadian citizen and a resident alien lawfully admitted to permanent

residence in the United States; he has been a resident of New York State since his arrival in the United States in 1964. Plaintiff challenges the constitutionality of Section 661(3) of New York's Education Law which precludes him from receiving academic performance awards, including Regents Scholarships, tuition assistance program awards, and student loans. This action is brought by plaintiff Alan Rabinovitch who was denied a Regents Scholarship solely on the basis of his status as an alien.

• • •

Venue

5. Plaintiff Alan Rabinovitch resides at 5945 Shore Parkway, Brooklyn, New York, within the Eastern District of New York. Venue is based on the plaintiff's residence.

Parties

6. Plaintiff Alan Rabinovitch lives at 5945 Shore Parkway, Brooklyn, New York, and at all times relevant was and is a Canadian citizen lawfully admitted to the United States as a permanent resident alien. At all times herein relevant he was and is a resident of the United States and of the State of New York.

7. Defendant Ewald B. Nyquist is Commissioner of Education of the State of New York and as such is charged by Section 602 of the Education Law with the duty of (1) selecting academic performance award recipients and (2) promulgating regulations defining the terms by which the President of the New York State Higher Education Services Corporation can determine a student's eligibility for student aid and loan programs. He is charged with enforc-

ing Section 661(3) of the Education law in carrying out his duties under Section 602. More generally, as chief executive officer of the New York State system of education and of the Board of Regents of New York, he is charged pursuant to Section 305(1) of the Education Law with enforcement of all general and special laws relating to the educational system of the State.

8. Defendant University of the State of New York ("USNY") is a not for profit corporation duly incorporated in the State of New York. Pursuant to its charter and the powers vested in it by Section 201 of the Education Law, as exercised by its agents, it is charged with the encouragement and promotion of eduaction in New York State through the distribution and regulation of its corporate funds.

9. Defendant Board of Regents of the State of New York is a body created by state law. The Board of Regents, pursuant to Section 202 of the Education Law, exercises all governing and corporate powers of defendant USNY.

10. Defendant New York State Higher Education Services Corporation ("NYSHESC") is an educational corporation created by Section 652 of the Education Law in the State Education Department and within the USNY under the Board of Regents for the purposes set out in Section 652, to wit, the administration of all of the New York State financial aid and loan programs for students of approved institutions of higher education as defined by the Education Law and the regulations promulgated by Commissioner Nyquist.

11. The defendant members of the Board of Trustees of NYSHESC (nine in number, Education Law § 652(3)) are here sued individually and in their capacities as Trustees of said corporation. Plaintiff has been unable to identify six of those individuals and has designated them Does I through VI. The other three trustees serve *ex officio;* they are Commissioner of Education Ewald B. Nyquist, Chancellor of the State University of New York Ernest L. Boyer and Chancellor of the City University of the City of New York Robert J, Kibbee. Under Section 652(3) of the Education Law, the Board of Trustees of NYSHESC is the governing body of said corporation and exercises all of its corporate powers. (See also Section 653, Education Law.)

12. The unnamed defendant President of NYSHESC is here sued individually and in his capacity as chief executive officer of said corporation. (See Section 654, Education Law.) Pursuant to Section 655 of the Education Law, he is responsible for administering for NYSHESC all of the student financial aid and loan programs of the State of New York.

Facts

13. As a result of the January 1973 Regents Qualifying Examinations, in or about April 1973, plaintiff Alan Rabinovitch was informed by defendants USNY and the Board of Regents that he was qualified and entitled to receive a Regents Scholarship and incentive assistance (now denominated tuition assistance).

14. In or about May 1973, plaintiff Alan Rabinovitch received from defendants USNY and the Board of Regents forms relating to his family's financial status and an application for American citizenship. He completed and returned the financial forms but did not complete the citizenship application.

15. In or about September 1973, plaintiff Rabinovitch was advised that the offer of a Regents Scholarship had been withdrawn on the sole ground that, since he did not intend to become a citizen of the United States, then Section 602(2) (now Section 661(3)) of the Education Law precluded his receipt of the Regents Scholarship. (A copy of said notice is annexed hereto as Exhibit A.)

16. The plaintiff has been a permanent resident of the United States and of New York State since 1964. He is a product of the New York City public school system, having graduated from Bildersee Junior High School (J.H.S. #68) and Canarsie High School. He graduated from high school in June 1973. Since September 1973 he has been enrolled as a full time student at Brooklyn College majoring in psychology. As a result of the action of the defendants and because of New York State law, plaintiff Rabinovitch is attending Brooklyn College without the benefit of the Regents Scholarship to which he is entitled by virtue of his performance on the competitive examination and without the benefit of the tuition assistance available to all non-alien college students in New York State (Section 667, Education Law).

17. Upon his eighteenth birthday, nearly three years ago, plaintiff Rabinovitch registered with the Selective Service System at Local Board #38, 271 Cadman Plaza East, Brooklyn, New York. He and all members of his family have regularly paid federal, state and city income and excise taxes. Plaintiff Rabinovitch, by virtue of his status as a lawfully admitted resident alien residing in New York State, incurs all of the obligations and bears virtually all of the responsibilities as are incurred and borne by citizens of the United States and New York State.

18. Plaintiff Rabinovitch and his entire family are Canadian citizens. It is plaintiff Rabinovitch's present intention to continue to reside in the United States and in New York State. However, he intends to retain his Canadian citizenship and does not intend to seek naturalization as an American citizen.

19. In January 1974 and again in March 1974, the attorneys for plaintiff Rabinovitch wrote to defendants' representatives requesting that he receive the scholarship funds to which he was entitled. Both of the letters brought forth a negative response. Defendants refused to award plaintiff Rabinovitch his Regents Scholarship and pay the funds due him solely because he was an alien and New York State law precluded the payment of scholarship monies to aliens.

20. Plaintiff Rabinovitch has completed two years of study at Brooklyn College. He intends to complete his course of study for a Bachelor's Degree and presently is considering attending graduate school. Plaintiff Rabinovitch believes he may require student loans to help cover the cost of his education. But for the provisions of 661(3) of the Education Law he would be entitled to receive such additional financial aid. Under present New York law he is barred from receiving a student loan simply because of his status as an alien.

First Claim for Relief

21. Defendants relied in 1973-74 upon New York State Education Law, Section 602(2), and now rely upon renumbered Section 661(3), for authority to impose the citizenship requirement upon the plaintiff as a prerequisite to his receipt of a Regents Scholarship, tuition assistance

and student loans. The statute as it reads today provides:

> "An applicant (a) must be a citizen of the United States, or (b) must have made application to become a citizen, or (c) if not qualified for citizenship, must submit a statement affirming intent to apply for United States citizenship as soon as he has the qualifications, and must apply as soon as eligible for citizenship."

(The last two words of the statute were added by Section 661(3); they do no appear in Section 602(2). Otherwise the two sections are identical.)

22. Defendants under color of New York law, provide to certain persons residing within the jurisdiction of the State of New York academic performance awards (e.g., Regents Scholarships), tuition assistance program awards and student loans, but deny these same benefits to other persons equally residing within the jurisdiction of New York State and equally qualified to receive such benefits solely on the basis that the latter class are aliens. In so acting defendants rely on the aforequoted statute. Defendants have thereby created arbitrary classifications of persons before the law in violation of plaintiff's right to the equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution.

23. The aforequoted citizenship restriction is beyond the powers under the Fourteenth Amendment to the United States Legislature to impose in that the said restriction has no reasonable relationship to any interest which the Legislature is constitutionally entitled to protect. The conclusive presumptions supporting the restriction are not necessarily or universally true in fact. The citizenship restriction is thus void as in violation of plaintiff's guaranty to substantive due process of law within the meaning of the Fourteenth Amendment to the United States Constitution.

24. The citizenship requirement contained in Section 661(3) of the Education Law (formerly Section 602(2)) is, under the Supremacy Clause of the United States Constitution, beyond the powers of the New York State Legislature to impose in that said requirement unduly encroaches on the exclusive power of the federal government to regulate immigration and alien residence, since it imposes significant burdens upon aliens lawfully admitted to permanent residence within the United States and causes such individuals to suffer an unlawful handicap and discrimination after lawful entry to the United States without the sanction of federal law in direct contravention of federal policy and constitutional power.

25. Insofar as Section 661(3) of the Education Law exceeds the requirements proscribed by 45 C.F.R. § 177.2 it is void as contrary to federal regulation.

Second Claim for Relief

26. By reason of the actions of the plaintiff and his attorneys, especially the prosecution of this litigation, which actions have been in the public interest and for the benefit of all similarly situated resident aliens in New York State, the attorneys for plaintiff Rabinovitch are entitled to an award of reasonable counsel fees from defendants to compensate them for their time, effort, initiative and service on behalf of the public interest.

WHEREFORE, plaintiff Alan Rabinovitch prays for an order of this Court:

1. Declaring that New York Education Law Section 661(3) is unconstitutional and null and void and of no legal force and effect; or, in the alternative, declaring that the

said statute as it applies to federally assisted loans is void as contrary to federal regulation as prescribed in 45 C.F.R. § 177.2.

2. Permanently enjoining defendants from (a) enforcing Section 661(3) of the Education Law and (b) refusing to grant plaintiff a Regents Scholarship, tuition assistance and student loans on the ground that, though a resident alien living in New York State, the applicant is not a United States citizen and does not intend to acquire citizenship status.

3. Requiring that defendants strike all references to the citizenship requirement from their application forms, brochures, literature and the like and requiring that defendants take affirmative action to overcome the effects of their past practices by giving notice to the public, especially high school, college and graduate students, indicating that resident aliens are eligible for academic performance awards, including Regents Scholarships, tuition assistance program awards and student loans.

4. Directing that defendants forthwith process, without regard to the provisions of Section 661(3) of the Education Law, the application for a Regents Scholarship and tuition assistance filed by plaintiff.

5. Directing the defendants to pay plaintiff Alan Rabinovitch the amount of money to which he was entitled under the Regents Scholarship and tuition assistance programs for the 1973-74 and 1974-75 school years plus interest, and ordering them to pay plaintiff the funds he is entitled to under said programs for the 1975-76 school year and all future school years.

6. Awarding the attorneys for plaintiff Rabinovitch reasonable attorneys' fees as fixed by the court to be paid by defendants.

7. Granting the plaintiff the costs of this action and such other and further relief as to the court may seem just and proper in the premises.

Dated: New York, New York, July 11, 1975.

Stroock & Stroock & Lavan
Gary J. Greenberg
Gregory K. Marks
61 Broadway
New York, New York 10006
(212) 425-5200

Burt Neuborne
American Civil Liberties Union
Foundation, Inc.
22 East 40th Street
New York, New York 10016

By Gary J. Greenberg
Attorneys for Plaintiff

Letter from Loretta Picarillo to Mrs. Leo Rabinovitch, Exhibit "A" to Amended Complaint

Exhibit "A" to the Amended Complaint is reproduced at p. 25, *ante*.

Motion for Summary Judgment and Preliminary Injunction on Behalf of Alan Rabinovitch

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that pursuant to Rules 56 and 65, Fed. R. Civ. P., and the June 3, 1975 order of Judge Curtin for the three-judge district court, plaintiff will move this court on July 22, 1975, at a time and place (in New York City) to be determined by the court for summary judgment and for preliminary injunctive relief. Plaintiff will move the court for summary judgment.

1. declaring Section 661(3) of the Education Law unconstitutional;

2. enjoining defendants from enforcing said statute;

3. requiring defendants to process plaintiff's application for a Regents Scholarship and tuition assistance filed in May 1973;

4. requiring defendants to award plaintiff his Regents Scholarship and tuition assistance;

5. requiring defendants to pay plaintiff the amount of money to which he will be entitled under said programs for the 1975-76 school year and all future years in which he satisfies the requisite criteria (other than citizenship);

6. ordering defendants to give notice of the fact that henceforth aliens will not be barred from receiving any form of financial assistance for higher education by notifying all high schools and institutions of higher education (public and private) located in New York State; and

7. ordering defendant New York State Higher Education Services Corporation ("NYSHESC") to pay plaintiff the Regents Scholarship and tuition assistance funds to which he was entitled for the 1973-74 and 1974-75 school years.

In addition plaintiff will ask the court to enter a preliminary injunction requiring defendant NYSHESC to place in escrow and trust for the benefit of plaintiff the sum of $2,500 to cover the Regents Scholarship and tuition assistance funds to which plaintiff will be entitled for the 1975-76 and 1976-77 school years if he prevails in this litigation.

Dated: New York, New York
June 27, 1975

STROOCK & STROOCK & LAVAN

By GARY J. GREENBERG
Gary J. Greenberg
Attorneys for Plaintiff
61 Broadway
New York, New York 10006
(212) 425-5200

Motion for Summary Judgment and Preliminary Injunction—Rabinovitch v. Nyquist

To: Louis J. Lefkowitz
Attorney General of the
State of New York
Two World Trade Center
New York, New York 10047

Cullen & Dykman
177 Montague Street
Brooklyn, New York 12201

McNamee, Lochner, Titus & Williams, P.C.
75 State Street
Albany, New York 12201

Statement pursuant to Rule 9(g) of the General Rules of the United States District Courts for the Southern and Eastern Districts of New York in Support of Motion for Summary Judgment

UNITED STATES DISTRICT COURT
Eastern District of New York

[SAME TITLE]

Pursuant to Local Rule 9(g) of the Rules of this Court, plaintiff submits the following statement of material facts as to which he contends there is no dispute.

1. Plaintiff is a citizen of Canada, lawfully admitted to the United States for permanent residence.

2. Plaintiff is a resident of New York State, living in Brooklyn, New York. He has resided in New York ever since his admission to the United States as a resident alien in 1964.

3. Plaintiff attends Brooklyn College, having commenced his studies at that institution in September 1973. He has successfully completed two years of study, and has two more years of college ahead of him in order to receive the Bachelor's Degree.

4. Plaintiff intends to complete his work for the Bachelor's Degree and then intends to pursue a graduate degree.

5. Plaintiff intends to retain his Canadian citizenship and does not intend to become a naturalized American, but plaintiff does intend to continue to reside in New York.

6. But for Section 661(3) of the Education Law, plaintiff is fully qualified to receive a Regents Scholarship, tuition assistance and student loans pursuant to Articles 13 and 14 of the Education Law.

7. Plaintiff took the January 1973 Regents Qualifying Examinations. In or about April 1973, he was informed in writing by the defendants University of the State of New York ("USNY") and the Board of Regents that, as a result of his performance on the competitive Regents Qualifying Examinations, he was qualified and entitled to receive a Regents Scholarship and incentive assistance (now termed tuition assistance).

8. In or about May 1973, plaintiff received from the defendants USNY and the Board of Regents forms relating to his family's financial status, and an application for American citizenship. He completed and returned the financial forms, but did not complete the citizenship application.

9. In or about September 1973, plaintiff was advised in writing that the offer of a Regents Scholarship had been withdrawn on the sole ground that, since he did not intend to become a citizen of the United States, Section 602 of the Education Law precluded his receipt of a Regents Scholarship. (A copy of that letter is attached as Exhibit A to the plaintiff's affidavit.) (Section 602 has been renumbered as Section 661(3) of the Education Law.

10. Defendants refused to grant plaintiff his Regents Scholarship or tuition assistance or pay any money to him solely because he is not an American citizen and does not intend to apply for citizenship and New York State's

Education Law precludes the payment of financial aid funds to aliens.

11. As a result of the action of the defendants and because of New York State law, plaintiff is attending Brooklyn College without the benefit of the Regents Scholarship and without the benefit of the tuition assistance available to all non-alien college students in New York State. In addition, he is not eligible for student loans.

Dated: New York, New York
June 27, 1975

STROOCK & STROOCK & LAVAN

By s/ Gary J. Greenberg
GARY J. GREENBERG
61 Broadway
New York, New York 10006
(212) 425-5200

Attorneys for Plaintiff

Affidavit of Alan Rabinovitch in Support of Motion for Summary Judgment

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF KINGS } ss.:

ALAN RABINOVITCH, being duly sworn deposes and says:

1. I am the plaintiff in this action. I submit this affidavit in support of the motion for summary judgment which is being made in my behalf. I am personally familiar with the matters set forth herein all of which are based on my own personal knowledge.

2. I was born on October 16, 1954 in Montreal, Canada. I am a Canadian citizen. Indeed, all members of my immediate family hold Canadian citizenship.

3. I was lawfully admitted to the United States as a permanent resident alien in 1964. At all times subsequent to my entry into the United States, I have been a permanent resident of the United States and of the State of New York.

4. I currently reside at 5945 Shore Parkway, Brooklyn, New York, 11236.

5. I am a product of the New York City public school system, having attended Bildersee Junior High School (J.H.S. No. 68) and Canarsie High School. I graduated from the latter school in June, 1973.

6. Since September 1973, I have been enrolled as a full time student at Brooklyn College majoring in psychology.

7. I took the January 1973 Regents Qualifying Examinations. In or about April 1973, I was informed in writing by the defendants University of the State of New York ("USNY") and the Board of Regents that, as a result of my performance on the competitive Regents Qualifying Examinations, I was qualified and entitled to receive a Regents Scholarship and incentive assistance (now termed tuition assistance).

8. In or about May 1973, I received from the defendants USNY and the Board of Regents forms relating to my family's financial status, and an application for American citizenship. I completed and returned the financial forms, but did not complete the citizenship application.

9. My family consists of my mother and father, a younger sister and myself. The family income, including money earned by me, amounts to about $11,000 per year.

10. Although it was in May 1973 and continues to be my intention to reside in the United States and in New York State, I then intended and currently intend to retain my Canadian citizenship. Accordingly, I did not in May 1973 apply for naturalization as an American citizen, and do not presently intend to apply for American citizenship.

11. In or about September 1973, I was advised in writing that the offer of a Regents Scholarship had been withdrawn on the sole ground that, since I did not intend to become a citizen of the United States, Section 602 of the Education Law precluded my receipt of a Regents Scholarship. (A copy of that letter is attached as Exhibit A.) (I am advised by my attorney that Section 602 has been re-

numbered and that under the new statute the citizenship restriction appears in Section 661(3) of the Education Law.)

12. After receiving Exhibit A, I decided to consult an attorney in order to ascertain what my rights and remedies, if any, were and to learn whether I could receive the funds which were being denied to me and which were of importance to me and my family.

13. In January 1974 and again in March 1974, my attorneys wrote to defendants' representatives requesting that I receive the scholarship funds to which I believe I am entitled. Both of those letters brought forth a negative response. Defendants refused to grant me my Regents Scholarship or tuition assistance or pay any money to me. They did so solely because I am not an American citizen and do not intend to apply for citizenship and New York State's Education Law precludes the payment of financial aid funds to aliens.

14. As a result of the action of the defendants and because of New York State law, I am attending Brooklyn College without the benefit of the Regents Scholarship to which I believe I am entitled by virtue of my performance on the competitive examination and without the benefit of the tuition assistance available to all non-alien college students in New York State.

15. While I do not wish to be understood to be in any way disparaging the quality of Brooklyn College, I believe the court should know that because I am disqualified from receiving any form of financial aid from New York State, I am required to attend a public college within New York City. Without financial assistance my family and I are not able to afford the tuition charged by New York's private

colleges. Also I am required to live in my parents' home because without financial aid we can not afford the expense involved in my attending college at either a private or public university located outside New York City.

16. I have completed two years of study at Brooklyn College. I intend to complete my course of study for a Bachelor's Degree, and I presently intend to go on to graduate school, perhaps to seek a Master's Degree in social work. I believe I may require student loans to help cover the cost of my education. I understand that student loans are available to all New York State residents, except aliens, without regard to the location of the university one attends. Under present New York law, I am barred from receiving a student loan simply because of my status as an alien.

17. Upon my eighteenth birthday, nearly three years ago, I registered with the Selective Service System at Local Board #38, 271 Cadman Plaza East, Brooklyn, New York. I and all members of my family have regularly paid federal, state and city income and excise taxes.

(Sworn to by Alan Rabinovitch on June 24, 1975.)

Answers to New York Higher Education Assistance Corporation's Interrogatories to Alan Rabinovitch

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

Plaintiff Alan Rabinovitch answers the Interrogatories served upon his counsel by defendant New York Higher Education Assistance Corporation ("NYHEAC") as follows:

1. Have you ever filed an application for financial assistance with regard to your educational expenses, including an application for a NYHEAC loan; and if so, give the details of such application including the name of the firm or organization with whom the application was filed, the date of filing and the amount of assistance or loan sought. If any application was approved, give the details thereof and the amount of funds which were awarded or loaned to you.

ANSWER:

Plaintiff has never filed an application for a NYHEAC loan. Plaintiff filed an application for a Regents Scholarship and tuition assistance in or about May 1973. Said application was filed with defendants University of the State of New York and the Board of Regents. That application was denied even though plaintiff satisfied all other criteria because of his status as an alien. Plaintiff also filed an application with Brooklyn College for a work-study grant for the summer of 1975 which application was granted. (For additional details as to the latter see answer to interrogatory 11.)

Answer to NYHEAC Interrogatories—
Rabinovitch v. Nyquist

2. Have you ever had an application for a NYHEAC loan rejected and if so, state the name of the person or firm rejecting such application, the date of rejection; and if any reason was given for such rejection, supply the details thereof.

ANSWER:

No.

3. What is your date of birth?

ANSWER:

October 16, 1954.

4. What is your marital status?

ANSWER:

Single.

5. What is your permanent street address?

ANSWER:

5945 Shore Parkway, Brooklyn, New York 11236.

6. How long have you been a resident of New York State?

ANSWER:

Eleven years.

7. Do you have an alien registration receipt card Form I-151; and if so, what is the date of issuance of said card?

ANSWER:

Yes, June 27, 1964.

8. What is the name of the educational institution which you are attending?

ANSWER:

Brooklyn College.

9. What is the current year of study in which you are engaged?

ANSWER:

Two years have been completed. Plaintiff will commence his third year of study in September 1975.

10. What is your expected date of graduation?

ANSWER:

June 1977.

11. Are you employed; and if so, what is the name and address of your employer, the hours or days of employment and the wages earned?

ANSWER:

Yes: Brooklyn College (Library), Ave. H and Glenwood Road, Brooklyn, New York. Plaintiff works 40 hours per week. Plaintiff's present employment is a summer job given to him by Brooklyn College under a work-study program. His compensation for the summer will be $850.

12. Have any other members of your family applied for loans guaranteed by NYHEAC; and if so, state what are their names and addresses?

ANSWER:

No.

13. Have you during the preceding twelve months resided with, been claimed as a dependent for federal income tax purposes by, or been the recipient of an amount in excess of $600.00 from one or both of your parents?

ANSWER:

Plaintiff resides with his parents, is supported by them and is claimed as a dependent on his parents' income tax return.

14. If the answer to the foregoing question is "Yes", give the details including the names and addresses of your parents.

ANSWER:

Mr. and Mrs. Leo Rabinovitch, 5945 Shore Parkway, Brooklyn, New York 11236.

15. If the answer to interrogatory "13" is "Yes" give the following information:

a. Adjusted gross income from tax returns for the last taxable year of your father and mother and yourself;

b. The number of personal exemptions claimed on tax returns by your mother and father;

c. Whether or not you were claimed as an exemption on tax returns filed by your mother and father;

d. The equity in any home owned by your father and mother;

e. The equity in any real estate owned by your mother and father;

f. The total quality in any business owned by your mother and father;

g. The balance of all checking and savings accounts of yourself, your mother and father;

h. All other investments of yourself, your mother and father;

i. Any non-taxable income of yourself, your mother and your father;

j. The amount of federal income tax paid by yourself, your mother or father.

ANSWER:

a. $12,678;

b. 4;

c. Yes;

d. The family rents an apartment and has no interest in any home;

e. The family owns no real estate;

f. The family owns no business;

g. There are no checking accounts. The family savings account has a balance of $1,000;

h. None;

i. None;

j. $1,336.80.

16. Are there any other children of your mother and father attending college and if so, state their names, place of residence and educational expenses attributable to each.

ANSWER:

None.

17. If you are married, answer the previous questions dealing with assets and income insofar as the same may relate to your spouse.

ANSWER:

Not applicable.

18. What are your debts; and if any, supply the name and address of the creditor, and nature of the debt and the unpaid balance.

ANSWER:

None.

19. What is the name and address of an adult person with whom you have frequent contact?

ANSWER:

Assuming the question means a non-family member, that is to say, someone who could serve as a reference, plaintiff states that such an individual would be his former English teacher at Canarsie High School, Mr. Fred Powers. The school is located at 1600 Rockaway Blvd., Brooklyn, New York.

Dated: New York, New York
July 17, 1975

STROOCK & STROOCK & LAVAN

By s/ GARY J. GREENBERG
Gary J. Greenberg
Attorneys for Plaintiff
61 Broadway
New York, New York 10006
212-425-5200

(Verified by Alan Rabinovitch on July 17, 1975.)

Defendants' Motion to Dismiss the Complaints or for Summary Judgment

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

74 Civ. 1142(OGJ)

ALAN RABINOVITCH,

Plaintiff,

—against—

EWALD B. NYQUIST, Commissioner of Education of the State of New York, et al.,

Defendants.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

NOTICE OF MOTION

Civ-75-73(JTC)

JEAN-MARIE MAUCLET,

Plaintiff,

—against—

EWALD B. NYQUIST, Commissioner of Education of the State of New York, et al.,

Defendants.

SIRS:

PLEASE TAKE NOTICE, upon the annexed statement under General Rule 9(g) of the District Court for the Eastern District of New York, the affidavit of J. Wilmer Mirandon,

sworn to July 15, 1975, and upon all the pleadings and prior proceedings had herein, the undersigned will move these statutory district courts at the United States Courthouse, Courtroom 11, 225 Cadman Plaza East, Borough of Brooklyn, City of New York at 2:10 o'clock in the afternoon, or as soon thereafter as counsel may be heard, for an order pursuant to Fed. R. Civ. P., Rules 12(b)(1)(6); (c); (h)(3) and 56(b) dismissing the complaints, or in the alternative granting summary judgment for the defendants, and for such other and further relief as to the Court may seem just and proper.

Dated: New York, New York
July 16, 1975

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
By:
s/ ROBERT S. HAMMER
ROBERT S. HAMMER
Assistant Attorney General
Attorney for Defendants
Office and P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-3394

To: MICHAEL DAVIDSON, ESQ.
John Lord O'Brien Hall
State University of New York
Buffalo, New York 14260

Defendants' Motion to Dismiss the Complaints or for Summary Judgment

STROOCK & STROOCK & LAVAN
61 Broadway
New York, New York 10006

MCNAMEE, LOCHNER, TITUS & WILLIAMS, P.C.
75 State Street
Albany, New York 12201

KEVIN KENNEDY, ESQ.
1520 Genesse Building
Buffalo, New York 14202

Affidavit of J. Wilmer Mirandon in Support of Defendants' Motion for Summary Judgment and in Opposition to Rabinovitch Motion for Summary Judgment

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

74 Civ. 1142 (OGJ)

ALAN RABINOVITCH,

Plaintiff,

—against—

EWALD B. NYQUIST, et al.,

Defendants.

• • •

STATE OF NEW YORK }
COUNTY OF ALBANY } ss.:

J. WILMER MIRANDON, being duly sworn, deposes and says:

1. I reside in the Town of Colonie, New York, and am presently serving as President of New York State Higher Education Services Corporation. Until July 1, 1975, I served as President of New York Higher Education Assistance Corporation.

2. In my capacity as President of New York Higher Education Assistance Corporation I was entirely familiar with the regulations of the Corporation and the eligibility requirements promulgated by said Corporation for the approval of guaranteed student loans.

Mirandon Affidavit

3. Said Corporation has always required that an alien applicant have permanent resident status and indicate his desire to become a citizen of the United States.

4. These regulations of New York Higher Education Assistance Corporation were filed with the United States Office of Education, Division of Insured Loans, and deponent knows that the administrators of the Federal Program were aware of the eligibility requirements adopted by said Corporation.

5. At no time has anyone employed in the United States Office of Education expressed any disapproval of said eligibility requirements or any concern that these requirements seemed more restrictive than the Federal requirements, which provide, in substance, that an alien loan applicant need only establish permanent resident status.

6. Deponent is informed and believes that there are within the City of New York three banks which make student loans to non-citizens, which said loans are guaranteed directly by the United States Office of Education, and that applicants for those loans need only establish permanent resident status. These banks are First National City Bank, Emigrant Savings Bank and Bankers Trust Company. In other words, a non-citizen who does not wish to indicate his desire to become a citizen may apply for a loan at one of those banks, which in turn will secure a guaranty directly from the Federal Government.

(Sworn to by J. Wilmer Mirandon, on July 15, 1975.)

Statement Pursuant to Rule 9(g) of the General Rules of the United States District Courts for the Southern and Eastern Districts of New York in Opposition to Rabinovitch Rule 9-g

[SAME TITLE]

1. Defendants contend that there are triable issues of fact as follows:

(a) As to plaintiff's intentions as set forth in paragraphs 4 and 5 of his Rule 9(g) statement

(b) As to his qualifications and eligibility for students loans, id., paragraph 6

2. Defendants contend that there are no triable issues as to the fact that plaintiff failed to apply to defendant New York Higher Education Assistance Corporation for participation in the guaranteed student loan program.

3. Defendants contend that paragraphs 11 and 12 of plaintiff's Rule 9(g) statement contain inaccurate statements of the law with respect to the payment of financial aid to aliens, who, pursuant to Education Law § 661(3) are eligible for such financial aid if they have applied for United States citizenship or submit a statement affirming intent to apply for United States citizenship as soon as they have the qualifications, and must apply as soon as eligible for citizenship.

4. In all other respects, defendants concur in the statement of facts set forth in plaintiff's Rule 9(g) statement.

Dated: New York, New York
July 16, 1975

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
By: s/ ROBERT S. HAMMER
ROBERT S. HAMMER
Assistant Attorney General
Attorney for Defendants
Office and P. O. Address
Two World Trade Center
New York, New York 10047

Student Payment Application, General Information and Instructions for 1974-75 Academic Year (Excerpts), Exhibit "A" in *Mauclet* v. *Nyquist*

The University of the State of New York

THE STATE EDUCATION DEPARTMENT

REGENTS EXAMINATION AND SCHOLARSHIP CENTER
99 Washington Avenue
Albany, New York 12210

To the Applicant:

This booklet contains your Student Payment Application for receiving benefits during the 1974-75 academic year under the Regents scholarship, child-of-veteran, and scholar incentive programs. In addition, it provides important general information for all applicants and specific instructions for completing the application form. *Be sure to read carefully those sections of the booklet that apply to you.*

• • •

NOTE: You must file your Student Payment Application by May 15, 1975, to be eligible to receive benefits for the 1974-75 academic year.

CONTENTS

[2] SECTION 1

GENERAL INFORMATION FOR ALL STUDENTS

This section describes requirements and benefits under the major programs of student financial assistance awards provided by the State of New York:

(a) Scholar incentive awards

(b) Regents awards for children of deceased or disabled veterans

(c) Regents scholarships

In addition, it explains the award certificate issued to students and the procedure for making payment. (See paragraphs d and e.)

Read carefully the information concerning each type of award. If you meet the eligibility requirements, complete the enclosed Student Payment Application according to the directions in section 2. *Keep this booklet for future reference.* It will help you to verify the accuracy of the award certificate that will be issued upon approval of your application.

In addition to a New York State award, you may be eligible to receive assistance under a federal program of aid to college students. For your convenience, a brief explanation of the Federal programs is presented in paragraph f, below.

---

a. Scholar Incentive Awards

Eligibility. You are eligible to receive a scholar incentive award if you:

(1) Are now a legal resident of New York State and have been a legal resident for at least 1 year. (If you have been residing in New York State for less than a full year, you may also qualify if you were previously a resident during your final year of high school or college study.)

(2) Are a citizen of the United States, or have made application for such citizenship, or file a statement of intent to make such application.

(3) Are matriculated in an approved program in New York State. Approved programs include college programs leading to an approved degree or certificate, hospital school programs of professional nursing, 2-year programs in registered private business schools, and degree programs in

trade or technical schools. (Students enrolled in the following types of programs are not eligible: nondegree programs in trade or technical schools, 1-year programs in registered private business schools, programs in hospital schools that do not lead to the professional nurse license, postdoctoral programs, or programs of theological or spiritual training.)

(4) Are a full-time student, enrolled for a minimum of 12 credits a semester, or 8 credits a quarter, or the equivalent. (Regular full-time students who have been restricted to limited physical regimen by serious medical disabilities may request special consideration, but prior approval for a limited program of study must be obtained.)

(5) Have a tuition charge (exclusive of fees) in excess of $200 a year.

(6) Had a combined family net taxable income for 1973 not exceeding $20,000. (For an explanation of how net taxable income is determined, see section 3, par. b.)

(7) File the Student Payment Application by the required deadline date, May 15, 1975.

You may receive scholar incentive assistance for a maximum of 4 years of undergraduate study (or 5 years in an approved 5-year baccalaureate program) and for a maximum of 4 years of graduate or professional study, but not for a total of more than 8 years of combined professional, graduate, and undergraduate study. Each year that you receive Regents scholarship or child-of-veteran assistance, even if additional scholar incentive assistance is not received, is counted as also reducing the remaining years of scholar incentive eligibility.

Award Schedule: The schedule of maximum scholar incentive awards established by law for the 1974-75 academic year is as follows:

New York State Net Taxable Balance	*Maximum Award For Year*
$2000 or less	$600
2001-6000	300
6001-8000	200
8001-20,000	100
20,001 or more	0

Adjustments in Awards. It is important to keep in mind that this schedule indicates only the upper limit of your award, as determined by income. Many students will receive less than the maximum entitlement indicated in this schedule, because of two types of adjustments required by law:

(1) *Adjustment for tuition charge.* Scholar incentive awards are for tuition only and they do not cover the first $200 of tuition per year. For example, if your tuition charge is $650 for the next year, your scholar incentive payment cannot be more than $450. *If the tuition charge does not exceed $200 a year, no scholar incentive payment will be made.* The costs of fees, books, dormitory, meals, and other expenses are not considered as tuition and cannot be covered by scholar incentive assistance.

(2) *Adjustment for State, Federal, and other awards.* Scholar incentive awards are limited by other educational benefits that would duplicate the purposes for which scholar incentive assistance is intended (except GI benefits, U.S. War Orphan benefits, or educational opportunity grants). If you are already receiving duplicative State, Federal or other benefits equal to the tuition charge, no scholar incentive assistance can be paid. If such other benefits are less than your tuition charge, the balance of your tuition may be covered by a scholar incentive award up to the maximum entitlement established above. (For an explana-

tion of what other educational benefits would duplicate the purposes of scholar incentive assistance, see instructions for Item 13, section 2.)

• • •

[3] b. *Regents Awards for Children of Deceased or Disabled Veterans*

Eligibility. You are eligible to receive this award if you:

(1) Are the child of a person: (a) who died in military service during World War I, World War II, the Korean Conflict, or the Vietnam Conflict, as a result of regular active duty during such a period, and who was a resident of New York State at time of induction or time of death, or (b) who is an honorably discharged veteran with a current disability of at least 50 percent resulting from service during such period, or who had such disability at time of death, and was a resident of New York State at time of induction.

(2) Are a legal resident of New York State.

(3) Are matriculated in an approved undergraduate program leading to a degree, dipoloma, or certificate in a college, or in a professional nursing program in a hospital school, or in a degree program in a business, trade, or technical school in New York State. (Students enrolled in nondegree programs in business, trade, or technical schools, or in nonnursing programs in hospital schools, or in programs of theological or spiritual training, are not eligible.)

(4) Are a full-time student, enrolled for a minimum of 12 credits a semester, or 8 credits a quarter, or the equivalent.

(5) File a special application for the award by the required date, as established below.

Benefits. All eligible students receive a uniform award of $450 a year for a maximum of 4 years of undergraduate study, or 5 years if the normal program of study is 5 years. The award is independent of family income or college tuition charge.

• • •

c. *Regents Scholarships*

The following scholarships are awarded by the Regents:

(1) Regents college scholarships,

(2) Regents scholarships for basic professional education in nursing,

(3) Regents war service scholarships for veterans,

(4) Regents scholarships for professional education in medicine, dentistry, and osteopathy.

These scholarships are awarded on a competitive basis to students who have made *special application* for such awards and who have taken the required competitive examinations. *The Student Payment Application in itself does not constitute a formal application for a Regents scholarship.*

• • •

[5] SECTION 2

INSTRUCTIONS FOR COMPLETING 1974-75 STUDENT PAYMENT APPLICATION

• • •

Eligibility for payment is not continued automatically from one academic year to the next. Each spring, a new application [6] form will be mailed to the legal address of

every student whose application was accepted during the previous college year, and also to every student who wrote the Regents Scholarship and College Qualification Test the previous fall. Other students may request applications after June 1. To assure receiving your application promptly, always report immediately any change in your legal address.

• • •

Item 8. ["Are you a citizen of the United States? Yes ☐ No ☐ (If No, Follow Instructions)"]. *Citizenship:* If entry is "No," you must obtain and submit a "Certificate of Intent to Apply for Citizenship" (SFA-414). To request this form use page 17. Also, see sec- [7] tion 3, par. d for an explanation of the residence status of noncitizens.

• • •

Item 11. ["Will you have been a legal resident of New York State for the 12 months immediately preceding the beginning of the first term for which you are requesting Financial Assistance? Yes ☐ No ☐."] *Residence:* An explanation of the legal residence requirement is given in section 3, par. d.

If you are not now a legal resident, or, if you have not been a legal resident of New York State for the 12 months immediately preceding the beginning of the first term for which you are requesting assistance, check "No."

If you have checked "No," see section 3, par. d for special instructions.

• • •

[10] SECTION 3

SPECIAL INSTRUCTIONS

(This section contains instructions and information of special interest to certain groups of students. The preceding sections will refer you to specific parts of section 3 that may apply to you.)

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a. *Awards for Regents Scholarships.*

• • •

Regents College Scholarships

Net Taxable Balance	*Annual Award*
$1,800 or less	$1,000
Between 1,800 and 9,300	999-251
9,300 or more	250

• • •

[12] d. *Residence.*

• • •

To qualify for a *scholar incentive award,* you must have been a legal resident of New York State for at least 12 months immediately preceding the beginning of the term for which you are applying for assistance and you must continue to maintain such residence during the period of the award. An applicant for an *undergraduate* award who is now a resident, but has not been a resident for the past year, may qualify if he was a resident during his last two terms of high school. Similarly, an applicant for a *graduate* level award who is now a resident, but has not been a resident for the past year, may qualify if he was a resident during his last two terms of undergraduate level study and continued such residence until matriculation in a graduate program.

It should be noted that permanent, bona fide residence in New York State is required. *Residence at a school or college for purpose of study does not in itself change the student's legal residence.* The legal residence of an unmarried college student is presumed to be the residence of the par-

ents. If the parents are not legal residents of New York State, the student will be considered a resident of New York State only if such claim is supported by specific confirmatory action, such as registering to vote in New York State. However, married students who have established a separate residence can generally claim such residence as their legal residence, unless there has been specific action indicating intent to establish or maintain residence elsewhere.

You are not a legal resident of New York State unless you are either a citizen of the United States or an immigrant to the United States. Foreign visitors holding student or other non-permanent visas are not legal residents.

Regents scholarship recipients who establish their legal residence at the time of their award must continue to maintain such residence during the period of the award.

The residence of a person is often a difficult question of law, depending on individual circumstances. If you have any question about your eligibility with regards to the residence requirement, complete the residence certificate and your case will be referred to our legal advisors for an opinion.

• • •

[17] Request for Supplementary Forms

Print your name and mailing address in this box.

Name

Number and
Street

City-State
ZIP Code

Date

Ident. No.

Series Program Number

Date of Birth

Month / Day / Year

You may use this form to request supplementary forms that you may need to complete your application. Supplementary forms should be submitted with completed application to insure expeditious processing of the application. *Read the instructions carefully.* Then, if necessary, detach and complete this form. Print your name and mailing address in the box provided above, check below the forms requested, and mail this form to:

Regents Examination and Scholarship Center
The State Education Department
99 Washington Avenue
Albany, New York 12210

(Do not use the envelope enclosed in the booklet for mailing this form. The envelope provided is for mailing your application.)

☐ SFA 14C	Request for Exclusion of Parental Income
☐ SFA 14D	Certification of Residence in New York State
☐ SFA 100	New York State Scholarship and Grant Programs Indicate the scholarship program for which you wish to make application. .....
☐ SFA 166A	Information and Application for Children of Deceased or Disabled Veterans
☐ SFA 414	Certificate of Intent to Apply for Citizenship

• • •

Opinion of the Three-Judge District Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Civ-75-73

JEAN-MARIE MAUCLET,

Plaintiff

—VS—

EWALD B. NYQUIST, Commissioner of Education of the State of New York,

Defendant

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

74-C-1142

ALAN RABINOVITCH, on behalf of himself and on behalf of all others similarly situated; namely, all residents of New York State who have been or may be denied New York State Regents Scholarships, etc.,

Plaintiffs

—against—

EWALD B. NYQUIST, Commissioner of Education of the State of New York, THE UNIVERSITY OF THE STATE OF NEW YORK, et al.,

Defendants

Before VAN GRAAFEILAND, Circuit Judge, JUDD, District Judge for the Eastern District of New York, and CURTIN, Chief Judge, Western District of New York.

• • •

Opinion of the Three-Judge District Court

CURTIN, Chief Judge:

Mauclet v. *Nyquist* was instituted by a resident alien in the Western District of New York; *Rabinovitch* v. *Nyquist* was brought by a resident alien in the Eastern District of New York. In both cases, New York Education Law § 661(3) (McKinney's Supp. 1975),[1] which requires an applicant for New York State financial aid[2] to be a United States citizen or intend to become a citizen, was challenged as unconstitutional. The cases were consolidated and heard by a three-judge court pursuant to 28 U.S.C. §§ 2281, 2284. The facts as set out below are not in dispute.[3]

Plaintiff Jean-Marie Mauclet, a resident of New York State since April 1969, is a graduate student at the State University of New York at Buffalo. He is a French citizen, married to an American citizen and father of an American citizen. He submitted an application for a tuition assistance award for the academic year 1974-1975 and satisfies all requirements for the award except citizenship.

---

[1] § 661(3), former § 602(2), provides, in pertinent part, as follows:

> Citizenship. An applicant (a) must be a citizen of the United States, or (b) must have made application to become a citizen, or (c) if not qualified for citizenship, must submit a statement affirming intent to apply for United States citizenship as soon as he has the qualifications, and must apply as soon as eligible for citizenship.
> (McKinney's Supp. 1975.)

[2] There are three general forms of student financial assistance: (1) General Awards, which include tuition assistance; (2) Academic Performance Awards, including regents scholarships; and (3) Student loans and loan guarantees. N.Y. Educ. Law §§ 667-680 (McKinney's Supp. 1975).

[3] Both plaintiffs motioned to amend their complaints to include the New York State Higher Education Services Corporation, an educational corporation formed in 1975, which coordinates the New York State financial aid programs. N.Y. Educ. Law § 652 (McKinney's Supp. 1975). The motions were granted orally at the three-judge court.

Plaintiff Alan Rabinovitch, a Canadian citizen, has been a resident of New York State since 1964. In January 1973, Mr. Rabinovitch took the competitive Regents Qualifying Examination, and thereafter was informed by defendants University of the State of New York and the Board of Regents that he was qualified to receive a regents scholarship. Subsequently, Mr. Rabinovitch was informed that the offer of scholarship was withdrawn solely because he did not intend to become a citizen, as required by § 661(3).

Both plaintiffs seek a judgment declaring § 661(3) invalid, enjoining its enforcement and requiring defendants to process the plaintiffs' applications for assistance. In addition, plaintiff Rabinovitch requests damages for past monies withheld by defendants. Both plaintiffs ask for attorney fees and costs.

Plaintiffs contend that § 661(3) denies to resident aliens the equal protection of the laws guaranteed by the fourteenth amendment, and conflicts with the comprehensive and preemptive congressional scheme regulating the entry and residence of aliens in the United States.

We must first resolve the preliminary question of standing. Clearly, plaintiffs have standing to contest the statute as it applies to the scholarship and tuition assistance award programs. However, defendants claim that plaintiffs do not have standing to challenge § 661(3) with respect to the student loan aspect of the program. Rabinovitch never applied for a student loan and Mauclet received one in the past, before he announced his intention not to become a United States citizen. At oral argument, the State admitted that had Rabinovitch applied for a student loan, and refused to make the required statement of intention to become a United States citizen, his application would have been refused. But the State apparently feels that the actual denial of an application is necessary to give plaintiffs standing to contest the constitutionality of § 661(3) as regards student loans. We do not agree.

Nothing would be gained by adjudicating the statute as it applies to all but one aspect of the assistance program. Both plaintiffs allege injuries from this statute. Both would be further injured were they to apply for student loans. We feel that this is a proper case in which to apply the expanded concept of standing and allow these plaintiffs to assert the rights of those aliens who are injured by this statute with regard to loans. *Eisenstadt* v. *Baird*, 405 U.S. 438, 443-446 (1972); *Barrows* v. *Jackson*, 346 U.S. 249 (1953).

In *Graham* v. *Richardson*, 403 U.S. 365 (1971), the Supreme Court declared:

> [C]lassifications based on alienage, like those based on nationality or race, are *inherently suspect and subject to close judicial scrutiny*. Aliens as a class are a prime example of a "discrete and insular" minority . . . for whom such heightened judicial solicitude is appropriate. 403 U.S. at 372. (Footnotes and citations omitted, emphasis added.)

The defendants maintain that the classification involved here is not based on alienage per se because only those aliens who do not wish to become citizens are denied assistance. The defendants emphasize that the applications of many resident aliens have been granted after these individuals either applied for United States citizenship or signed a statement agreeing to do so as soon as they were eligible. This argument defies logic. Those aliens who apply, or agree to apply when eligible, for citizenship are relinquishing their alien status. Because some aliens agree under the statute's coercion to change their status does not alter the fact that the classification is based solely on alienage.

Next the defendants argue that since education is not a fundamental or basic constitutional right, *San Antonio*

Independent School District v. *Rodriguez,* 411 U.S. 1 (1973), the standard of strict judicial scrutiny is inapplicable. But it is long settled that where a suspect classification is involved, strict scrutiny is to be invoked whether or not the right involved is fundamental. *Graham* v. *Richardson, supra,* at 375-376.

In the case *In Re Griffiths,* 413 U.S. 717 (1973), in which a Connecticut rule excluding aliens from admission to the practice of law was struck down, the Supreme Court was explicit as to the burden a state must bear to justify the use of a suspect classification:

> The Court has consistently emphasized that a State which adopts a suspect classification "bears a heavy burden of justification," *McLaughlin* v. *Florida,* 379 U.S. 184, 196 (1964), a burden which, though variously formulated, requires the State to meet certain standards of proof. In order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is "necessary . . . to the accomplishment" of its purpose or the safeguarding of its interest. 413 U.S. at 721-722 (footnotes omitted).

Defendants have failed to meet this burden. First they argue that the various forms of assistance are gratuities that can be distributed according to the sovereign's will. But the Supreme Court "has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a privilege.'" *Graham* v. *Richardson, supra,* at 374. Next the State asserts that its interest in an educated electorate, fully able to participate in community political life, and the plaintiffs' refusal to accept the responsibilities of citizenship, are sufficient reasons for it to limit assistance to citizens and future citizens.

For this proposition, the State cites *Spatt* v. *New York,* 361 F.Supp. 1048, *aff'd* 414 U.S. 1058 (1973), in which the State's requirement that its assistance could only be used at colleges and universities within New York State was upheld. It is doubtful that defendants' explanation would survive even the rational relationship test applied in *Spatt.*[4] Although resident aliens may not vote, they pay taxes, register with the Selective Service, and "contribute in myriad other ways to our society." *In Re Griffiths, supra,* at 722. In any case, the State has not demonstrated a compelling interest justifying its discriminatory classification.

§ 661(3) is therefore unconstitutional and defendants are enjoined from its enforcement. Defendants are directed to process plaintiff Mauclet's 1974-1975 tuition assistance application that was pending when he started this suit, and to re-qualify plaintiff Rabinovitch as a State regents scholarship recipient, as of the date his complaint was filed.

Having ruled on plaintiffs' fourteenth amendment claim, there is no need to reach plaintiffs' argument that § 661(3) is unconstitutional because it encroaches on the exclusive federal power over aliens.

Plaintiff Rabinovitch requests money damages in addition to injunctive relief. While declaratory and injunctive relief is appropriate, it is the opinion of this court that *Edelman* v. *Jordan,* 415 U.S. 651 (1974), holding that the eleventh amendment barred the courts from ordering state

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[4] The court in *Spatt* found no fundamental right or suspect classification invoking strict scrutiny, and therefore analyzed the State's interests under the rational relationship test. The court found that the State had a valid interest in encouraging gifted students to attend New York schools, in building a strong system of colleges within the State and in attempting to achieve an equalization of school financing costs between in-state and out-of-state students. None of the above mentioned interests are served by excluding qualified, tax-paying resident aliens.

officials to remit benefits wrongfully withheld from eligible welfare applicants, does not allow the award of money damages in this case.

So ordered.

s/ ELLSWORTH A. VAN GRAAFEILAND
Ellsworth A. Van Graafeiland
United States Circuit Judge

s/ ORRIN G. JUDD
Orrin G. Judd
United States District Judge
Eastern District of New York

s/ JOHN T. CURTIN
John T. Curtin
United States District Judge
Western District of New York

Dated: February 11, 1976.

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF NEW YORK

CIVIL ACTION FILE NO. 75-73

JUDGMENT

JEAN-MARIE MAUCLET

vs.

EDWALD B. NYQUIST, Commissioner of Education of the State of New York

This action came on for ~~trial~~ (hearing) before the Court, Honorable Ellsworth A. VanGraafeiland, Orrin G. Judd and John T. Curtin, United States District Judge[s], presiding, and the issues having been duly ~~tried~~ (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that Section 661(3) of the New York Education Law is unconstitutional and defendants are enjoined from its enforcement. Defendants are directed to process plaintiff Mauclet's 1974-1975 tuition assistance application that was pending when he started this suit.

Dated at Buffalo, New York, this 11th day of February, 1976.

JOHN K. ADAMS
Clerk of Court

Notice of Appeal in *Mauclet* v. *Nyquist*

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Civ-75-73

NOTICE OF APPEAL

JEAN-MARIE MAUCLET,

Plaintiff,

against

EWALD B. NYQUIST, Commissioner of Education of the State of New York, and NEW YORK HIGHER EDUCATION SERVICES CORPORATION,

Defendants.

NOTICE IS HEREBY GIVEN, that the above-named defendants hereby appeal to the Supreme Court of the United States from the final order and judgment of this Court entered February 11, 1976, which, *inter alia,* declared New York Education Law § 661(3) unconstitutional and enjoined its enforcement.

This appeal is taken pursuant to 28 U.S.C. § 1253.

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Attorney for Defendants

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Notice of Appeal in Mauclet v. *Nyquist*

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[Filed in W.D.N.Y. on March 12, 1976.]

Judgment in *Mauclet* v. *Nyquist* and *Rabinovitch* v. *Nyquist*

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Civ-75-73

JEAN-MARIE MAUCLET,

Plaintiff,

—*vs.*—

EWALD B. NYQUIST, Commissioner of Education of the State of New York, and NEW YORK STATE HIGHER EDUCATION SERVICES CORPORATION,

Defendants.

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

74 Civ 1142

ALAN RABINOVITCH,

Plaintiff,

—*vs.*—

EWALD B. NYQUIST, Commissioner of Education of the State of New York, THE UNIVERSITY OF THE STATE OF NEW YORK, THE BOARD OF REGENTS OF THE STATE OF NEW YORK, THE NEW YORK STATE HIGHER EDUCATION SERVICES CORPORATION and the NINE INDIVIDUAL MEMBERS OF THE BOARD OF TRUSTEES OF SAID CORPORATION, namely DOES 1 through VI and *ex officio* EWALD B. NYQUIST, ERNEST L. BOYLR and ROBERT J. KIBEE, and the PRESIDENT OF SAID CORPORATION (the unnamed individuals being unknown to plaintiff),

Defendants.

Judgment in Mauclet v. *Nyquist and Rabinovitch* v. *Nyquist*

This action came on for trial before a three judge court, the Honorable Ellsworth A. Van Graafeiland, United States Circuit Judge, the Honorable Orrin G. Judd, United States District Judge, and the Honorable John T. Curtin, United States District Judge, presiding, and a memorandum and order of the court having been filed on February 17, 1976, that New York Education Law § 661(3) is unconstitutional and that defendants are enjoined from its enforcement and directing the defendants to process plaintiff Mauclet's 1974-1975 tuition assistance application that was pending when he started this suit, and to re-qualify plaintiff Rabinovitch as a State regents scholarship recipient, as of the date his complaint was filed, and denying money damages to plaintiff Rabinovitch.

ORDERED and ADJUDGED that New York Educatiton Law § 661(3) is unconstitutional and the defendants are enjoined from its enforcement, and that the defendants process plaintiff Mauclet's 1974-1975 tuition assistance application that was pending when he started this suit, and re-qualify plaintiff Rabinovitch as a State regents scholarship recipient, as of the date his complaint was filed and that the plaintiff Rabinovitch is not entitled to money damages.

Dated: Brooklyn, New York
March 26, 1976

LEWIS ORGEL
Clerk

ELLSWORTH VAN GRAAFEILAND
U.S.C.J.

JOHN T. CURTIN
U.S.D.J.

ORRIN G. JUDD
U.S.D.J.

[Filed in E.D.N.Y. on March 29, 1976.]

Notice of Appeal in *Mauclet* v. *Nyquist* and *Rabinovitch* v. *Nyquist*

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Civ. 75-73 (JTC)

JEAN-MARIE MAUCLET,

Plaintiff,

—against—

EWALD B. NYQUIST, Commissioner of Education of the State of New York, and NEW YORK HIGHER EDUCATION SERVICES CORPORATION,

Defendants.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NOTICE OF APPEAL
74 C 1142 (OGJ)

ALAN RABINOVITCH,

Plaintiff,

—against—

EWALD B. NYQUIST, Commissioner of Education of the State of New York, *et al.*,

Defendants.

NOTICE IS HEREBY GIVEN, that the defendants herein hereby appeal to the Supreme Court of the United States from so much of the amended final order and judgment of this Court entered March 29, 1976, which, *inter alia*, declared New York Education Law § 661(3) unconstitutional,

enjoined its enforcement, directed the requalification of the plaintiff Rabinovitch as a State Regents scholarship recipient and the processing of plaintiff Mauclet's application for tuition assistance.

This appeal is taken pursuant to 28 U.S.C. § 1253.

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By
s/ Robert S. Hammer
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[Filed in E.D.N.Y. on May 28, 1976.]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-208

EWALD B. NYQUIST, *Commissioner of Education of the State of New York*, et al.,

Appellants,

v.

JEAN-MARIE MAUCLET,

Appellee,

and

EWALD B. NYQUIST, *Commissioner of Education of the State of New York*, et al.,

Appellants,

v.

ALAN RABINOVITCH,

Appellee.

MOTION TO AFFIRM ON BEHALF OF ALAN RABINOVITCH

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Of Counsel:

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TABLE OF CONTENTS

Table of Authorities

Cases

STATUTES & RULES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-208

EWALD B. NYQUIST, *Commissioner of Education of the State of New York*, et al.,

Appellants,

v.

JEAN-MARIE MAUCLET,

Appellee,

and

EWALD B. NYQUIST, *Commissioner of Education of the State of New York*, et al.,

Appellants,

v.

ALAN RABINOVITCH,

Appellee.

MOTION TO AFFIRM ON BEHALF OF ALAN RABINOVITCH

Pursuant to Rules 16(c) and (d) of the Rules of this Court, plaintiff-appellee Alan Rabinovitch moves that the judgment of the district court be affirmed insofar as it

declared § 661(3) of the New York Education Law unconstitutional and enjoined its enforcement.[1]

Jurisdiction

The case was heard by a three-judge district court pursuant to 28 U.S.C. § 2281. The judgment of the District Court for the Eastern District of New York pertaining to the *Rabinovitch* case (dated March 26, 1976) was entered by the Clerk of said court on March 29, 1976. Appellants' notice of appeal was filed on May 28, 1976. Jurisdiction of this appeal as it relates to appellee Rabinovitch is conferred by 28 U.S.C. § 1253.[2]

Question Presented

Whether the district court erred in unanimously concluding that Section 661(3) of the New York Education Law was unconstitutional.

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[1] Appellee Rabinovitch also sought a judgment against appellant New York State Higher Education Services Corporation, awarding him withheld scholarship and tuition assistance funds. The district court denied such relief, citing *Edelman* v. *Jordan*, 415 U.S. 651 (1974). Mr. Rabinovitch has appealed to this Court from that aspect of the decision below. His appeal is pending under docket number 75-1809.

[2] The *Rabinovitch* case was heard together with a similar case filed in the Western District of New York, *Mauclet* v. *Nyquist*, Civ. 75-73. The cases were decided by a single opinion. However, the judgment of the District Court for the Western District of New York in the *Mauclet* case was entered on February 11, 1976. (It is not reprinted in the Jurisdictionaal Statement.) The judgment of the Eastern District was not entered until March 29, 1976. A notice of appeal was filed by appellants in the Western District on March 12, 1976; in the Eastern District the notice of appeal was filed on May 28, 1976. Accordingly, it appears that appellants failed to docket their appeal from the *Mauclet* judgment in a timely fashion. Rules of the Supreme Court 13. Jurisdiction nonetheless lies because the appeal in the *Rabinovitch* case is timely.

Statement

The facts are undisputed. They are set forth in the Jurisdictional Statement (4-7), in the opinion of the court below (J.S. 14a-15a; 406 F. Supp. 1233, 1234) and in the Jurisdictional Statement filed on behalf of Mr. Rabinovitch in No. 75-1809 at pages 4-7.

Argument

1. In June of this year the Court reaffirmed the principle that "state classifications based on alienage are subject to 'strict judicial scrutiny.'" *Examining Board* v. *Flores de Otero*, —— U.S. ——, 96 S. Ct. 2264, 2281, 49 L.Ed.2d 65, 85 (1976). That rule derives from the fact that classifications based on alienage as the distinguishing characteristic, like those based upon color, race or national origin "are inherently suspect . . . . Aliens as a class are a prime example of a 'discrete and insular' minority for whom such heightened judicial solicitude is appropriate." *Graham* v. *Richardson*, 403 U.S. 365, 372 (1971). *Accord*, *Sugarman* v. *Dougall*, 413 U.S. 634, 642 (1973). A state which incorporates a suspect classification into its laws "bears a heavy burden of justification." *McLaughlin* v. *Florida*, 379 U.S. 184, 196 (1964); *In re Griffiths*, 413 U.S. 717, 721 (1973).[3]

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[3] The fact that New York's statutory classification is between citizens and those resident aliens able and willing to become American citizens on the one hand, and resident aliens not so willing on the other, is not constitutionally significant. In the case of *Takahaski* v. *Fish & Game Commission*, 334 U.S. 410 (1948), the division was between citizens and resident aliens eligible for United States citizenship, and ineligible resident aliens. That statutory distinction closely resembles the current case, and *Takahaski* clearly holds that kind of statutory discrimination invidious. Thus, the fact that the classification found in § 661(3) is not exactly between alien and citizen cannot be used as a mitigating shield to justify the use of a less than stringent constitutional analysis.

In four recent cases this Court considered classifications based on an individual's status as an alien, and in each case it struck down the state statute or rule involved for failure to meet the compelling state interest test.[4] Two lower courts have considered classifications similar to the one herein at issue and in both cases the statute has been struck down as unconstitutional.[5] In two recent decisions, the United States District Court for the Southern District of New York has declared unconstitutional other New York State statutes which discriminate against aliens.[6]

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[4] *Graham* v. *Richardson, supra* (denial of welfare benefits to aliens); *Sugarman* v. *Dougall, supra* (New York statute barring aliens from holding positions in the state competitive civil service system); *In re Griffiths, supra* (aliens denied admission to bar); *Examining Board* v. *Flores de Otero, supra* (Puerto Rican statute limiting the practice of engineering to United States citizens). *Accord, Miranda* v. *Nelson,* 351 F. Supp. 735 (D. Ariz. 1972) (three-judge court), *aff'd,* 413 U.S. 902 (1973) (statute and state constitutional provision barring aliens from public employment, including public educational institutions). *See also Truax* v. *Raich,* 239 U.S. 32 (1915) and *Takahaski* v. *Fish & Game Commission, supra* (wherein the Court invalidated state laws limiting the employment opportunities of aliens). *Cf. Hampton* v. *Mow Sun Wong,* —— U.S. ——, 96 S. Ct. 1895, 48 L.Ed.2d 495 (1976).

[5] *Chapman* v. *Gerard,* 456 F.2d 577 (3d Cir. 1972) (aliens barred from participation in Virgin Islands territorial scholarship fund); and *Jagnandan* v. *Giles,* 379 F. Supp. 1178 (N.D. Miss. 1974) (three-judge court) (state statute classifying aliens as non-residents for the purpose of charging higher tuition and fees to attend state supported institutions of higher education).

[6] *Surmeli* v. *New York,* 412 F. Supp. 394 (S.D.N.Y. 1976) (practice of medicine limited to citizens and resident aliens who become citizens within ten years of licensure); *Norwick* v. *Nyquist,* —— F. Supp. —— (74 Civ. 2798; July 20, 1976) (three-judge court) (aliens precluded from teaching in New York public schools). *Contra, Foley* v. *Connelie,* —— F. Supp. —— (75 Civ. 4548; July 9, 1976) (S.D.N.Y.) (three-judge court) (upholding by a 2-1 vote the constitutionality of a New York statute excluding aliens from employment as New York State police officers; Circuit Judge Mansfield filed a strong dissent).

2. Does New York's exclusion of aliens from all forms of assistance for higher education serve a compelling state interest? The district court concluded that appellants "failed to meet this burden . . . . [T]he State has not demonstrated a compelling interest justifying its discriminatory classification." (J.S. 17a, 18a; 406 F. Supp. at 1236.) We submit that that holding is clearly correct and should be affirmed.

In *Jagnandan* v. *Giles, supra,* a three-judge district court voided a Mississippi statute which classified all aliens as non-residents for state university tuition. *Jagnandan* is particularly instructive in that Mississippi had enacted a residency requirement for students seeking to qualify for the benefits of resident tuition rates. However, resident aliens, no matter how long they lived in Mississippi, could never qualify so long as they refused to become citizens. Here New York also has a residency requirement which the student must satisfy prior to receiving financial assistance. Education Law § 661(5). However, the resident alien is not allowed to receive educational assistance funds even after he establishes his residence in New York State in conformity with § 661(5) so long as he refuses to seek naturalization as an American citizen. As the Mississippi court put it, such a statutory scheme "on its face, creates an invidious discrimination and offends the Equal Protection Clause." 379 F. Supp. at 1186.

Neither reason appellants have advanced (J.S. 7, 10) supports the constitutionality of § 661(3).

(a) The "special public interest" doctrine, which held that a state government was justified in giving preference to citizens in the distribution of scarce economic resources —*see Crane* v. *New York,* 239 U.S. 195 (1915)—has been specifically rejected as a basis for upholding classifications based on alienage. *Graham* v. *Richardson, supra,* 403 U.S. at 375. There "can be no 'special public interest' in tax revenues to which aliens have contributed on an equal basis

with the residents of the State." *Id.* at 376. *Accord, Sugarman* v. *Dougall, supra,* 413 U.S. at 644-45.

(b) The appellants argue that § 661(3) is designed to "enhance" the "political community by increasing the educational level of the electorate . . . and by providing inducements to membership." (J.S. 10) The court below concluded that this justification would probably not even survive "the rational relationship test." (J.S. 17a; 406 F. Supp. at 1236.)

There is no requirement in New York's financial aid programs that any citizen-student who receives assistance must remain in New York and participate, via at least becoming a registered voter, in the "political community." Appellee and his family have lived in New York for twelve years and have contributed directly and indirectly to the well-being of the community in which they reside. Nonetheless, appellee has been excluded from receiving any form of educational assistance. On the other hand, an American citizen who may have lived elsewhere all of his life and who, therefore, together with his family, has contributed much less to the well-being of the community, is entitled to the full panoply of assistance after only approximately nine months residence in the state. Education Law § 661(5). Indeed, while appellee presently intends to continue to reside in New York after graduation, the citizen may, and is in fact free to, leave New York after the receipt of thousands of dollars of educational assistance. The appellee will continue to contribute to the well-being of the state and will use within the state the knowledge and skills acquired in college; the citizen may well leave New York after graduation and take with him the benefits derived from the funds received and never make any contribution to the community.

The foregoing result is simply not constitutionally permissible under the compelling state interest standard (and probably not even under the rational relationship

standard). *See Sugarman* v. *Dougall, supra,* 413 U.S. at 645-46;[7] *Chapman* v. *Gerard, supra,* 456 F.2d at 578-79. Section 661(3) is simply not structured to precisely achieve its supposed purpose. Because a classification subject to strict judicial scrutiny fails to satisfy that test if it is "insufficiently 'tailored' to achieve the articulated state goal." *Dunn* v. *Blumstein,* 405 U.S. 330, 357 (1972), the court below correctly determined that § 661(3) must be declared unconstitutional as violative of the equal protection clause of the Fourteenth Amendment.

3. Although not discussed in the opinion below, § 661(3) also violates the due process clause of the Fourteenth Amendment and the supremacy clause.

(a) Laws erecting irrefutable presumptions have long been disfavored as conflicting with the due process clause. Recently such laws have been struck down by this Court as contrary to due process requirements.[8] The teaching of those cases is that the use of an incontrovertible presumption to work an automatic exclusion from a right must be rejected "when that presumption is not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination." *Vlandis* v. *Kline, supra* at 452.

In the instant case New York has, by § 661(3), precluded all non-citizens who are not willing to become citizens from receiving educational assistance. This broadly defined exclusion leaves no scope for individual exceptions, so its

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[7] *See also* the district court opinion under review in *Sugarman,* 339 F. Supp. 906, 909 (S.D.N.Y. 1971) (three-judge court).

[8] *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632 (1974) (presumption that pregnant women were incapacitated from teaching); *Department of Agriculture* v. *Murry,* 413 U.S. 508 (1973) (denial of food stamps eligibility on basis of irrebuttable presumptions of lack of need); *Vlandis* v. *Kline,* 412 U.S. 441 (1973) (irrebuttable presumption of student nonresidency); *Stanley* v. *Illinois,* 405 U.S. 645 (1972) (irrebuttable presumption preventing unwed father's custody of child).

congruence with the facts must be virtually perfect to meet the rational relationship necessary under the due process clause to sustain the legislation.

We submit that whatever factual assumptions may be at the heart of § 661(3), purporting to justify its exclusion of aliens from educational assistance—among them that citizens are less mobile, more apt to stay in New York and participate in the political life of the community, more likely to enrich the social and economic communities or to pay a fair share of taxes—resident aliens and citizens in fact exist whose lives run counter to the factual assumptions. A prime example is Alan Rabinovitch and the members of his family.

Even assuming, *arguendo,* that the statutory generalizations are predominantly right, that is not to say that they are not sometimes incorrect. Some resident aliens are undoubtedly exemplars of good citizenship; some are considerably less transient than citizens only temporarily in New York; and some resident aliens have contributed far more to the work force and tax base of New York than many citizens. On the other hand, a large number of citizens eschew the political life of the community. In light of the lack of congruence between the statutory assumptions and the actual factual pattern, the automatic exclusion of § 661(3) sweeps too broadly. Legislation using alienage as the distinguishing characteristic must be artfully and narrowly drawn so as not to work an indiscriminate and overly broad denial of basic rights. The existence of non-conforming individuals in the face of the statute's conclusive assumptions makes it clear that its language is too loose and results in an unwarranted deprivation of due process of law.[9]

[9] The due process clause has been the basis for invalidating irrebutable presumptions in the field of education. *See Vlandis* v. *Kline, supra; Jagnandan* v. *Giles, supra,* 379 F. Supp. at 1187; *Moreno* v. *University of Maryland,* —— F. Supp. ——, 45 U.S.L.W. 2056 (Civ. No. M-75-691; July 13, 1976) (D. Md.).

(b) Recently this Court reiterated the constitutional principle established in *Traux* v. *Raich, supra,* and *Takahaski* v. *Fish & Game Commission, supra,* that "state regulation not congressionally sanctioned that discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional burdens not contemplated by Congress." *DeCanas* v. *Bica,* —— U.S. ——, 96 S. Ct. 933, 938 n. 6, 47 L.Ed.2d 43, 50 n. 6 (1976). Statutes which discriminate against lawfully admitted aliens deter them from entering and residing in the state. The imposition of such burdens and the resulting deterrence of residency are "inconsistent with federal policy . . . . Since such laws encroach upon exclusive federal power, they are constitutionally impermissible." *Graham* v. *Richardson, supra,* 403 U.S. at 380.

Congress has specifically legislated as to the legal status of aliens vis-a-vis the laws of the several states. In 42 U.S.C. § 1981 Congress granted to aliens the full and equal benefit of all state laws "as is enjoyed by white citizens." Accordingly, this Court has held that "aliens lawfully within this country have a right to enter and abide in any State in the Union 'on an equality of legal privileges with all citizens, under non-discriminatory laws.' *Takahashi,* 334 U.S. at 420." *Graham* v. *Richardson, supra,* at 378.

Section 661(3) is clearly in conflict with 42 U.S.C. § 1981 in that it denies to aliens the equal benefit of the laws of New York enjoyed by citizens in the matter of financial aid for higher education. Since § 661(3) conflicts with federal law in an area in which the latter is supreme and exclusive, the supremacy clause mandates a ruling that New York's statute is unconstitutional.[10]

[10] To the extent that New York seeks to induce resident aliens into citizenship in order to enhance the "national political community" (J.S. 10), it is engaged in an endeavor beyond its concern and powers. Under the Constitution only the federal government, acting through the Congress or the President, may enforce measures to enhance the national political community. *Cf. Hampton* v. *Mow Sun Wong, supra.*

Conclusion

For the foregoing reasons, the judgment of the three-judge district court should be affirmed insofar as it declared § 661(3) of the New York Education Law unconstitutional.

September 8, 1976.

Respectfully submitted,

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In The

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-208

EWALD B. NYQUIST, Commissioner of Education of the State of New York, et al.,

Appellants,

v.

JEAN-MARIE MAUCLET,

Appellee,

and

EWALD B. NYQUIST, Commissioner of Education of the State of New York, et al.,

Appellants,

v.

ALAN RABINOVITCH,

Appellee.

On Appeal from the United States District Courts for the Eastern and Western Districts of New York

MOTION TO DISMISS OR AFFIRM ON BEHALF OF JEAN-MARIE MAUCLET

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TABLE OF CONTENTS

APPENDIX

In The

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OCTOBER TERM, 1976

No. 76-208

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v.

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Appellants,

v.

ALAN RABINOVITCH,

Appellee.

On Appeal from the United States District Courts for the Eastern and Western Districts of New York

MOTION TO DISMISS OR AFFIRM ON BEHALF OF JEAN-MARIE MAUCLET

Appellee, Jean-Marie Mauclet, moves pursuant to Rule 16 of this Court for dismissal of the appeal from the judgment of the United States District Court for the Western District of New York, entered February 11, 1976, or, in the alternative, for affirmance of that judgment. The February 11 judgment, the only judgment entered in appellee Mauclet's action, was not printed in appellant's jurisdictional statement. It is reprinted

here on page 1a. Appellant's notice of appeal from the February 11 judgment, dated March 12, 1976, the only notice of appeal filed in the Western District, was also not printed in the jurisdictional statement. It is reprinted here on page 2a.

1. Although appellant Nyquist took a timely appeal from the February 11, 1976 judgment entered in appellee Mauclet's action, appellant has failed to docket an appeal on time or seek an extension of time within the Court's rules. Although the timely docketing of an appeal is not a jurisdictional requirement, *Communist Party of Indiana v. Whitcomb*, 414 U.S. 441, 446 fn. 4 (1974), dismissal is warranted when an appeal is docketed belatedly and there is neither an application to enlarge time nor an explanation at the time docketing. *Pittsburgh Towing Company v. Mississippi Valley Barge Line Company*, 385 U.S. 32, *rehearing denied* 385 U.S. 995 (1966).

Appellees Rabinovitch and Mauclet, separately represented, began their individual actions in the Eastern and Western Districts of New York, respectively. Both appellees requested the convening of three judge courts, and the Chief Judge of the Court of Appeals for the Second Circuit designated a panel consisting of Judge Curtin, Chief Judge of the Western District, Judge Judd of the Eastern District, and Judge Van Graafeiland of the Court of Appeals. For the purpose of the Mauclet action, Judge Judd was designated to be a judge of the Western District; for the purpose of the Rabinovitch action, Judge Curtin was designated to be a judge of the Eastern District. The motions for summary judgment were heard together, and a single decision was rendered. Nevertheless, the actions remained as separate proceedings within the districts in which they were commenced. A judgment in respect to appellee Mauclet was entered in the Western District on February 11, 1976, and an appeal filed on March 12, 1976. A separate judgment was entered in the Eastern District on March 29, 1976, and an appeal was filed on May 28, 1976. Although the March 29 judgment refers to both actions it was filed only in the

Rabinovitch action in the Eastern District, and was never filed in the Western District. A comparison of the February 11 and March 29 judgments shows that the latter does not amend the former in respect to appellee Mauclet.

By the time appellees moved in this Court, on July 19, 1976, to enlarge their time to docket the appeal, their time to act in respect to the February 11 judgment and their March 12 appeal had long since passed. However, appellants failed to inform the Court in their motion of the earlier and separate judgment and appeal. They then failed to explain in their jurisdictional statement the untimely docketing of their appeal from the February 11 judgment. In fact, they failed to even reprint or refer to the February 11 judgment and March 12 appeal in their jurisdictional statement. It may fairly be argued that appellees, to this date, have not docketed their appeal in respect to the February 11 judgment. At best, their jurisdictional statement is untimely. This Court should dismiss the appeal insofar as it concerns appellee Mauclet on the ground that appellants have failed to comply with the rules of this Court.

2. On the merits, appellee Mauclet endorses and incorporates the arguments in the Motion to Affirm on Behalf of Alan Rabinovitch. The only point to be added is that appellee Mauclet's claim for financial relief was narrower than Mr. Rabinovitch's. Mr. Mauclet requested only that he be made eligible for state financial assistance for the academic year in which he commenced his action, and for succeeding years, but not for any prior year. The district court granted Mr. Mauclet all the relief he sought, and for that reason he did not join in Mr. Rabinovitch's appeal. Otherwise, Mr. Mauclet's position is in full accord with that of Mr. Rabinovitch.

Conclusion

For the foregoing reasons, the appeal from the judgment in appellee Mauclet's action should be dismissed, or, in the alternative, the judgment should be affirmed.

Respectfully submitted,

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Dated: September 22, 1976

APPENDIX

JUDGMENT

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF NEW YORK

JEAN-MARIE MAUCLET

vs.

EWALD B. NYQUIST, Commissioner of Education of the State of New York

Civil Action File No. 75-73

This action came on for hearing before the Court, Honorable Ellsworth A. VanGraafeiland, Orrin G. Judd and John T. Curtin, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that Section 661(3) of the New York Education Law is unconstitutional and defendants are enjoined from its enforcement. Defendants are directed to process plaintiff Mauclet's 1974-1975 tuition assistance application that was pending when he started this suit.

Dated at Buffalo, New York, this 11th day of February, 1976.

JOHN K. ADAMS
Clerk of Court

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JEAN-MARIE MAUCLET,

Plaintiff,

against

EWALD B. NYQUIST, Commissioner of Education of the State of New York, and NEW YORK HIGHER EDUCATION SERVICES CORPORATION,

Defendants.

Civ-75-73

NOTICE IS HEREBY GIVEN, that the above-named defendants hereby appeal to the Supreme Court of the United States from the final order and judgment of this Court entered February 11, 1976, which, *inter alia*, declared New York Education Law § 661(3) unconstitutional and enjoined its enforcement.

This appeal is taken pursuant to 28 U.S.C. § 1253.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-208

EWALD B. NYQUIST, Commissioner of Education of the State of New York, and NEW YORK STATE HIGHER EDUCATION SERVICES CORPORATION,

Appellants,

against

JEAN-MARIE MAUCLET,

Appellee.

EWALD B. NYQUIST, Commissioner of Education of the State of New York, THE UNIVERSITY OF THE STATE OF NEW YORK, THE BOARD OF REGENTS OF THE STATE OF NEW YORK, THE NEW YORK HIGHER EDUCATION ASSISTANCE CORPORATION, WILLARD C. ALLIS, DR. ERNEST BOYER, DR. JUDAH CAHN, WILMOT R. CRAIG, THOMAS P. DENN, WALTER A. KASSENBROCK, NORMA KERSHAW, REV. LAURENCE J. MCGINLEY, S. J., WILLIAM G. MORTON and RUSSEL N. SERVICE, being the members of the board of directors of said corporation, and THE NEW YORK STATE HIGHER EDUCATION SERVICES CORPORATION,

Appellants,

against

ALAN RABINOVITCH,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURTS FOR THE WESTERN AND EASTERN DISTRICTS OF NEW YORK

BRIEF FOR APPELLANTS

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TABLE OF CONTENTS

TABLE OF CASES

STATUTES AND REGULATIONS

Federal Statutes

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-208

EWALD B. NYQUIST, Commissioner of Education of the State of New York, and NEW YORK STATE HIGHER EDUCATION SERVICES CORPORATION,

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Appellants,

against

ALAN RABINOVITCH,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURTS FOR THE WESTERN AND EASTERN DISTRICTS OF NEW YORK

BRIEF FOR APPELLANTS

Ewald B. Nyquist, Commissioner of Education of the State of New York, the above-named public officials, agencies and corporations ("appellants") appeal from a judgment of the United States District Courts for the

Western and Eastern Districts of New York (statutory three-judge court), dated March 26, 1976. The judgment declares New York Education Law § 661(3) invalid under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and permanently enjoins its enforcement. The statute authorizes state financial assistance for higher education for qualified citizens and aliens who have applied for citizenship, who would apply if not disabled from doing so and who are paroled refugees.

Opinions Below

The opinion of the three-judge district court (A. 96-102•), dated February 11, 1976, is reported at 406 F. Supp. 1233.

The decision and order of the single district judge in support of the convening of a three-judge court in *Mauclet* v. *Nyquist, et ano.* (A. 11-12), dated May 22, 1975, is unreported.

The memorandum and order of the single district judge in support of the convening of a three-judge court in *Rabinovitch* v. *Nyquist, et al.* (A. 39-44), dated May 23, 1975, is unreported.••

Jurisdiction

The jurisdiction of this Court is conferred by 28 U.S.C. § 1253.

The judgment of the three-judge district court (A. 106-107) was filed on March 29, 1976.•••

• References prefixed by the letter "A" refer to the Appendix filed on this appeal.

•• Additional defendants in both cases are not indicated hereafter.

••• A judgment in *Mauclet* v. *Nyquist*, prepared by the Clerk of the United States District Court for the Western District of New York, was filed on February 11, 1976 (A. 2, 103). The March 29 judgment carries the captions of both actions and is signed by the members of the three-judge court (A. 106-107). It was filed in the United States District Court for the Eastern District of New York where the three-judge court was convened (A. 6).

Appellants' Notice of Appeal from the March 29 judgment (A. 108-109) was filed on May 28, 1976.• The jurisdictional statement was filed on August 11, 1976. Probable jurisdiction was noted on November 1, 1976.

Questions Presented

1. Should New York Education Law § 661(3) be reviewed under a strict equal protection test because it excludes some alien students from state financial assistance for higher education?

2. Is the denial of state financial assistance to aliens who refuse naturalization under § 661(3) reasonably or substantially related to New York's interests in distinguishing those students who are the proper objects of its public funds from those who are not and to its interests in expanding its political community and educating its electorate?

3. Does appellee Rabinovitch have standing to challenge § 661(3) insofar as it pertains to student loans as distinguished from awards although he has not applied for a loan and had he applied, it might have been denied on an alternative ground?

State Statute Involved

New York Education Law § 661, as amended by L. 1975, c. 663, § 1, effective July 1, 1975, states in part:

> *"Eligibility requirements and conditions governing awards and loans*
>
> • • •

• Appellant Nyquist filed a Notice of Appeal from the Western District judgment in *Mauclet* v. *Nyquist* on March 12, 1976 (A. 2, 104-105). Appellee Rabinovitch has filed a cross-appeal to this Court from the March 29 judgment insofar as it denies him damages equal to the financial assistance he alleges he would have received but for his refusal to apply for United States citizenship. *Rabinovitch* v. *Nyquist, et al.*, Doc. No. 75-1809.

3. Citizenship. An applicant (a) must be a citizen of the United States, or (b) must have made application to become a citizen, or (c) if not qualified for citizenship, must submit a statement affirming intent to apply for United States citizenship as soon as he has the qualifications, and must apply as soon as eligible for citizenship, or (d) must be an individual of a class of refugees paroled by the attorney general of the United States under his parole authority pertaining to the admission of aliens to the United States."

Statement of the Case

Appellees Mauclet and Rabinovitch are permanent resident aliens (A. 8, 19, 97). Appellee Mauclet is a French citizen and was a graduate student at the State University of New York at Buffalo on the date of the judgment below (A. 8, 97, 106). He filed a timely application for a tuition assistance award ("TAP") for the academic year 1974-1975. The application was denied under Education Law § 661(3) because of appellee's failure to provide the State Education Department with proof of the filing of a petition for naturalization (A. 8-9, 97). Appellee Mauclet has lived in New York State since April 1969, is married to an American citizen and the father of a child of that marriage (A. 8). He "intends to reside permanently in the United States . . . [but] does not wish to relinquish his French citizenship at this time." A. 8-9.

Appellee Rabinovitch is a Canadian citizen (A. 20, 57) and an undergraduate student at Brooklyn College in New York City (A. 19, 56). In April 1973, he was advised by the State Board of Regents that he had qualified for a Regents college scholarship on the basis of his performance on a competitive examination (A. 18, 57, 98). He was provided with the appropriate forms for the scholarship and for TAP together with an application for United States

citizenship. He refused to complete the citizenship application and was disqualified under Education Law § 661(3). A. 19, 25, 55-56, 62, 98. Although appellee Rabinovitch has never applied for a state student loan (A. 73), he believes he may need such loans in the future and that he will be disqualified under Education Law § 661(3). A. 57, 71, 98-99. Appellee has lived in New York State since 1964 (A. 19, 56, 98). He "intends to continue to reside in the United States and in New York State." A. 57. He "intends to retain his Canadian citizenship and does not intend to seek naturalization as an American citizen." *Ibid.*

Appellees brought separate actions for declaratory and injunctive relief against Education Law § 661(3). *Mauclet* v. *Nyquist* was commenced in the Western District of New York. The complaint alleges that § 661(3) is unconstitutional under the Equal Protection Clause and in conflict with a federal constitutional and statutory plan regulating immigration and naturalization (A. 9, 11). *Rabinovitch* v. *Nyquist* was commenced in the Eastern District of New York. The amended complaint alleges the same grounds for invalidating § 661(3) (A. 58, 59) and, in addition, claims a due process violation on the theory that statute is supported by conclusive presumptions not necessarily or universally true in fact (A. 58). Appellee Rabinovitch also claimed damages equal to the amount he would have received from a Regents college scholarship and TAP for the academic years 1973-74 and 1974-75 (A. 60) and sought a class action order (A. 15-16).

The single district judge in both cases held that appellees' constitutional claims were sufficient to vest the courts with subject matter jurisdiction under 28 U.S.C. § 1343(3) and to warrant the convening of a three-judge court (A. 11-12, 40-44). The *Rabinovitch* motion for a class action order was denied (A. 44) as was appellees' motion to dismiss the *Mauclet* complaint (A. 11).

The cases were heard together (A. 45, 97). Appellants moved for dismissal or summary judgment (A. 78).* Both appellees moved for summary judgment (A. 47, 62). The affidavits in support of appellees' motions generally parallel the allegations of the amended complaints (A. 49-51, 68-71).**

The affidavit of Jean-Marie Mauclet adds the fact that he received a state student loan for the 1974-75 academic year in apparent conflict with Education Law § 661 (A. 50-51).*** Appellee also adds that he would have been denied a State University (tuition assistance) scholarship for 1974-75 because of his ineligibility for TAP (A. 50). However, no conflict with § 661(3) is presented with respect to the 1974-75 loan. Appellee does not state, and the record does not otherwise establish, what appellee told the lender concerning his citizenship status. Nor would appellee have been denied a State University (tuition assistance) scholarship on the ground alleged since such scholarships are not limited to TAP recipients. State University of New York State, *University Scholarship Administrative Policies*, Item 058.

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* Appellants contended in part that appellee Rabinovitch lacked standing to challenge Education Law § 661(3) insofar as it pertained to the state student loan program (A. 98-99). The issue was raised again in appellants' jurisdictional statement, pp. 4, 11, and is briefed herein at Point II. The legislative history of the student loan program and its related citizenship and national affinity requirements (pp. 16-17) and arguments sustaining those requirements under the Equal Protection Clause (pp. 18-24) are presented for completeness. They are not intended to suggest waiver or abandonment of appellants' jurisdictional objection to the adjudication of the constitutionality of Education Law § 661(3) in relation to student loans.

** Both complaints were amended (A. 47-48, 52-62) before the three-judge court to add the New York State Higher Education Services Corporation as a defendant (A. 97 n. 2). The amended complaint in *Rabinovitch* also deletes former class action allegations and makes minor additions and revisions to the factual allegations (A. 53-57).

*** Appellee Mauclet did not allege either a present need for a loan or the filing of a new application (A. 50-51).

The affidavit of Alan Rabinovitch adds that because of his disqualification from state financial assistance, he is required to attend "a public college within New York City" and to "live in [his] parents' home." A. 70-71. Appellee does not disparage the quality of the education he is receiving in "any way." A. 70.

The three-judge court limited its consideration of Education Law § 661(3) to appellees' equal protection claims (A. 101). Although both citizens and aliens may obtain financial assistance under § 661(3), the court applied the strict equal protection test stating that the classification was "based solely on alienage" (A. 99) and therefore "'*subject to close judicial scrutiny.*'" *Ibid.* quoting *Graham* v. *Richardson*, 403 U.S. 365, 372 (1971). (Emphasis added by the three-judge court.)

New York's interest in limiting gifts for educational purposes to aliens who are willing to make an affirmative political commitment to the United States and to the state was rejected as a restatement of special public interest doctrine held insufficient in *Graham* v. *Richardson, supra* at 374 (A. 100). The state interest "in an educated electorate fully able to participate in community political life" advanced by the statute (A. 100) did not justify the exclusion of aliens who refused to accept the responsibilities of citizenship because the excluded aliens "pay taxes, register with the Selective Service, and 'contribute in myriad other ways to our society.'" A. 101, quoting *In re Griffiths*, 417 U.S. 717, 722 (1973). The court added that it did not find either interest "compelling" in any event (A. 101).

Appellee Rabinovitch was allowed standing to challenge § 661(3) insofar as it regulated student loans (A. 98-99). His claim for damages was denied on the authority of *Edelman* v. *Jordan*, 415 U.S. 651 (1974). A. 101-102.

New York Student Grant and Loan Programs: Citizenship and National Affinity Requirements

New York provides financial assistance to students for higher education through competitive, academic performance awards, non-competitive general awards, both grants, and student loans. New York Education Law, Arts. 13 and 14, §§ 604, 605, 667-669, 670-674 and 680-684 (McKinney's Supp. 1975), added by L. 1974, c. 942, § 16, effective July 1, 1975. The cost of the program was $145,766,000 in fiscal 1975-76.*

There are two minimum eligibility requirements regardless of the type of assistance sought, citizenship or national affinity [Education Law § 661(3)] and state residence [Education Law § 661(5)]. Under § 661(3), an applicant "(a) must be a citizen of the United States, or (b) must have made application to become a citizen, or (c) if not qualified for citizenship, must submit a statement affirming his intent to apply . . . as soon as he has the qualifications, and must apply as soon as eligible, or (d) must be an individual of a class of refugees paroled by the attorney general of the United States . . . ."** One academic or calendar year of student residence is generally required. § 661(5)(a) and (b). Current legal residence is sufficient

* Of this amount, $111.4 million was expended for tuition assistance ("TAP") general awards, $24.9 million for competitive awards (scholarships) and the balance for interest and defaults on guaranteed loans.

** Clause "(d)" was added by L. 1975, c. 663, § 1, effective July 1, 1975. It is intended to allow paroled refugees greater flexibility in meeting eligibility requirements so that they may obtain education and retraining without regard to delays in the adjustment of their immigration status. Letter from J. W. Mirandon, President of the New York State Higher Education Services Corporation to Judah Gribbitz, Counsel to the Governor, dated July 22, 1975, included in Bill Jacket for L. 1975, c. 663; Memorandum of Assemblyman George A. Cincotta, 1974 N.Y.S. Legislative Annual 171. See 8 U.S.C. §§ 1182 (d)(5) and 1153 (a)(7).

for certain general awards. Education Law §§ 668 (awards for children of deceased and disabled war veterans), 669 (awards for children of deceased correction officers and civilian employees of correctional facilities). See also Education Law § 674 (competitive awards for veterans with war service—residence at time of entry into service and at time of award).

Awards may be used at approved institutions within the state and for instruction given outside the state under the auspices of in-state institutions. Education Law § 661 (4)(a). Loans may be used at any college or vocational school that conforms with regulations. Education Law §§ 661, 680.

The Legislature centralized the administration of awards and loans in the New York State Higher Education Services Corporation ("NYSHESC") in 1974 in its last major revision and recodification of Articles 13 and 14. L. 1974 c. 942, § 16, effective July 1, 1975.* The citizenship and national affinity requirements now in § 661(3) were applied to both awards and loans at that time. *Ibid.* However, citizenship and national affinity requirements had been adopted for each assistance program prior to their centralization in NYSHESC.

Academic Performance Awards:

Regents College Scholarships

Regents college scholarships were the first financial assistance program for New York students pursuing higher education. L. 1913, c. 292, § 1, adding §§ 70-77 to the Education Law of 1909, as amended, effective August 1, 1913. Scholarships are awarded to students completing high school programs on the basis of competitive examina-

* Start-up provisions (§§ 651, 652, 654, 657 and 660) for the corporation were effective on June 14, 1974. L. 1974, c. 942, § 35(2). Corporate powers became effective on July 1, 1975. L. 1974, c. 942, § 35(3).

tion. Education Law § 605(1) (McKinney's Supp. 1975).* With minor exceptions that insure distribution throughout the state, they are allocated by county in the same ratio as the number of graduating students in the county bears to number of graduating students in the state. Education Law § 605(1)(a) and (b). Current law provides for the award of 18,843 scholarships. Education Law § 670(1). Each scholarship entitles the recipient to $250 annually commencing with the 1974-1975 academic year. Education Law § 670(b).

Citizenship was first codified as a requirement for Regents college scholarships by L. 1920, c. 502, § 1, effective May 4, 1920.** The eligible class was expanded in 1957 to include "minors and natural children of parents, at least one of whom is a citizen," L. 1957, c. 756, § 4, effective July 1, 1957, and in 1959, to include, in addition, minors and natural children of parents "at least one of whom has duly declared intention of becoming . . . [a] citizen in accordance with law." L. 1959, c. 479, § 1, effective July 1, 1959.***

Statutory citizenship and national affinity requirements were deleted by L. 1961, c. 391, § 2, effective April 1, 1961, and reference to the pertinent Regents Rule required in-

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* There are five additional competitive awards: Regents professional education in nursing scholarship [Education Law §§ 605 (a), 671], Regents professional education in medicine or dentistry scholarships [§§ 605(3), 672], Regents physician shortage scholarships [§§605(4); 673], Regents war veteran scholarships [§§ 605 (5), 674], and Regents Cornell University scholarships [§ 605(6)].

** An oath of allegiance to the United States and the State of New York was required of scholarship recipients as early as 1917. Minutes of the Board of Regents for July 19, 1917, adding § 568 to ch. XIV of the Regents Rules.

*** The 1957 and 1959 amendments referred to § 604(3) of the Education Law of 1947, as amended. The 1947 Law, as amended, was repealed by L. 1969, c. 1154, effective July 1, 1969.

stead.* The change from statute to administrative rule was intended to provide a "uniform" requirement for all scholarships. State Education Department Memorandum, McKinney's Laws of 1961, p. 1964.** The "Regents Rule" that met the need created by L. 1961, c. 391, § 2, required citizenship or the filing of an application for citizenship. Minors were relieved of the requirement if they filed a statement of intent to apply when reaching 18 years of age. Failure to make application at that time was grounds for revocation of the scholarship. 8 NYCRR § 145.4 (March 29, 1962).

Section 145.4 remained the governing requirment until 1969 when it was repealed following the enactment of L. 1969, c. 1154, § 3 effective July 1, 1969. *** It was amended in 1968 to include all individuals under disabilities rather than minors alone. 8 NYCRR § 145.4, effective November 6, 1968.

In addition to the change from statutory to administrative regulation of citizenship and affinity requirements for scholarships just described, the 1961 legislation effected major revisions in state financial assistance to students for higher education. L. 1961, cc. 388-394. Scholar incentives, now tuition assistance (TAP), were established; Regents Scholarships were increased; amounts that could be loaned or guaranteed on behalf of a student were in-

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* All 1961 amendments appear in McKinney's Education Law §§ 601-2100 (main volume).

** At the time of the enactment of L. 1961, c. 391, § 2, the Commissioner of Education administered 12 separate scholarship programs.

*** L. 1969, c. 1154, §§ 1, 3, repealed Article 13 of the Education Law of 1947, as amended, and added a new Article 13 governing competitive and non-competitive awards. Statutory citizenship and national affinity requirements were restored as § 602 of the Article. The text of L. 1969, c. 1154, does not appear in the current McKinney's Education Law §§ 601-2100.

creased, and the students' obligations to pay interest and repay principal were eased. See Governor's Message, McKinney's Laws of 1961, pp. 2183-84, 2105-2106. The Legislature enacted findings, purposes and objectives with respect to the award of regents scolarships and scholar incentives at that time, stating in part (L. 1961, c. 389, § 1*):

• • •

"(a) Individual self-realization and development depends importantly on the availability of opportunities for not only the specially talented but for all who have the desire and capacity for higher education. The future progress of the state and nation and the general welfare of the people depend upon the individual development of the maximum number of citizens to provide the broad range of leadership, inventive genius, and source of economic and cultural growth for oncoming generations.

"In a world of unmatched scientific progress and technological advance, as well as of unparalleled danger to human freedom, learning has never been more crucial to man's safety, progress and individual fulfillment. In the state and nation higher education no longer is a luxury; it is a necessity for strength, fulfillment and survival.

"(b) Those who complete undergraduate training will be the teachers, doctors, engineers, scientists and other leaders in every aspect of economic, political and cultural life of tomorrow. They will be in the forefront of free men seeking to meet the challenge posed by those who would crush and subvert human freedom and democratic government.

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* The text of §1 is reprinted in the Historical Note preceding § 601 of McKinney's Education Law §§ 601-2100 (main volume).

"(c) • • • It is in the vital interest of all the people of the state to develop fully this reservoir of talent and future leadership [by providing more extensive and increased awards]."

Statutory citizenship and affinity requirements were restored by L. 1969, c. 1154, § 3, Art. 13, § 602(2).* Section 602(2) defined three classes of eligibles: citizens, applicants for citizenship, and persons who, if not qualified for citizenship, affirmed their intent to apply as soon as qualified and did apply.** The 1969 text was incorporated verbatim in the 1974 legislative revisions, L. 1974, c. 942, § 16, effective July 1, 1975, and renumbered § 661(3). The text has continued down to date with the addition of clause "(d)," L. 1975, c. 663, effective July 1, 1975, extending eligibility to paroled refugees. See second footnote, p. 8.

General Awards: TAP

Non-competitive, general awards, known initially as scholar incentives, now tuition assistance ("TAP"), were added to the state program by L. 1961, c. 389, § 4, effective April 11, 1961, adding § 601-a to the Education Law of 1947, as amended.

TAP awards are available to all undergraduate students (for up to 5 years of study) and graduate students (for up to 4 years of study) who meet the basic eligibility requirements of Education Law § 661(3), (5) (McKinney's Supp. 1975) and who demonstrate the ability to complete

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* L. 1969, c. 1154, §§ 1 and 3, respectively repealed Article 13 of the Education Law of 1947, as amended, and added a new Article 13.

** As is apparent, the substance of the governing "Regents Rule" during the period 1961-69 was adopted. 8 NYCRR § 145.4, repealed effective July 22, 1969.

their courses. Education Law §§ 604(1), 667(1)(2).* Awards cannot be made unless tuition exceeds $200 annually, cannot exceed tuition, and cannot duplicate other benefits except in limited circumstances. Education Law § 667(1), (3)(c), (4)(2)(a), (b). No award can be made if student and/or parental income exceeds $20,000 annually. Education Law § 667(3)(b), (4)(2)(c). Within these parameters, graduate students and undergraduate students who were enrolled prior to the 1978-1979 academic year generally receive from $100 to $600 annually depending upon their financial circumstances. Education Law § 667 (3)(b). Undergraduate students who enroll for the 1978-1979 academic year or thereafter will generally receive from $100 to $1500 annually depending on their financial circumstances. Education Law § 667(4)(1).

Scholar incentive and TAP awards were increased on two occasions, particularly for less affluent students. See memoranda of Governors Rockefeller and Wilson in support of L. 1969, c. 1154, McKinney's Laws of 1969, p. 2588, and L. 1974, c. 942, McKinney's Laws of 1974, p. 2117, respectively. However, the legislation's original purpose of providing a limited financial incentive to a large class of individuals continues.**

> "[T]he program will serve as an incentive for students to proceed with their college course . . . [and will also] generate in the minds of many students in high school, knowing that there is some provision for them if they are able to complete high school, a desire

* There are two additional non-competitive awards: Regents awards for children of deceased and disabled veterans [Education Law §§ 604(1), 668] and Regents awards for children of deceased state correction officers and civilian employees of correctional facilities [§§ 604(3), 669].

** One hundred and twenty-two thousand awards were contemplated under the original enactment. Governor's message on approving L. 1961, cc. 388-394, McKinney's Laws of 1961, p. 2105.

> to make a greater effort to do so. * * * [T]he amount of money which will be available for each student is not great measured by the present costs of college education but a great many of the students, with this start, will be able to obtain other help. [*]

TAP awards did not initially carry statutory citizenship of national affinity requirements although the legislative findings, purposes and objectives expressly applicable to the program established the appropriateness of such requirements. L. 1961, c. 389, § 1. See discussion, pp. 12-13. However, the statutory citizenship and affinity requirements for Regents college scholarships were repealed in favor of a uniform administrative rule simultaneously with the enactment of the TAP program, L. 1961, c. 391, § 2, and it was the Legislature's apparent belief that appropriate requirements for both programs would be established administratively. See pp. 10-11. This view is supported by the Governor's message approving L. 1961, cc. 388-394, which states in part (McKinney's Laws of 1961, p. 2106): "Both in the method of qualifying for assistance and in administrative detail, the Scholar Incentive Program [TAP] follows the well-established principles of the Regents College Scholarship Program." Citizenship and affinity requirements were by then an integral part of the scholarship program. However, the Board or Regents and the Commissioner of Education did not promulgate a pertinent rule or regulation for TAP as distinguished from Regents scholarships. See 8 NYCRR § 145.4, repealed effective July 22, 1969, and discussion, pp. 10-11, 13.

Statutory citizenship and national affinity requirements for TAP were enacted by L. 1969, c. 1154, § 3, adding Art. 13, § 602(2), to conform with the scholarship program requirements. Joint Legislative Committee to Revise and

[*] Memorandum of the State Education Department in support of L. 1961, c. 389, McKinney's Laws of 1961, pp. 1963-64.

Simplify the Education Law, Higher Education Staff Report No. 9, p. 3 (April 23, 1969). As noted, the statutory requirements assumed their present form [except for clause "(d)"] with the enactment of § 602(2) of Chapter 1154.

Student Loans

The student loan program was established in 1957 under the auspices of the New York Higher Education Assistance Corporation ("NYHEAC"). L. 1957, c. 367, effective April 11, 1957, adding Article 14 to the Education Law of 1947, as amended.*

Loans are guaranteed by the corporation, now NYSHESC. They are available to assist students attending or planning to attend college or vocational school who meet the basic eligibility requirements of Education Law § 661(3), (5). Education Law § 680 (1)(a), (b) (McKinney's Supp. 1975).** The lender generally receives a maximum of 7% interest. Education Law § 680(1). NYSHESC *Handbook on Scholarships, Grants and Student Loans* p. 27 (rev. 12/75) (hereafter "Handbook p. "). A borrower with an adjusted family income between $0-$15,000 is generally entitled to an interest-free grace period until at least nine months after he completes or terminates his course of study. Education Law § 682(2)(3).**

Current statutory provisions governing amounts, interest rates, and maximum repayment periods [Education Law §§ 680 (1), 682(1), 683(1)] are tied directly to the requirements of the Federal Guaranteed Student Loan

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* NYHEAC was superseded by NYSHESC on July 1, 1975. L. 1974, c. 942, § 16.

** There has not been any in-state limitation. See Education Law § 651 (main volume), added by L. 1957, c. 367, § 1.

*** Borrowers with adjusted family incomes between $15,000 and $30,000 pay interest at the rate of 3% during the grace period. Borrowers with adjusted family incomes over $30,000 pay the full 7%. Handbook, p. 27.

Program, Title IV, Part B of the Higher Education Act of 1965, as amended, 20 U.S.C. §§ 1071-1087-2, 45 C.F.R. Part 177 (1975 ed.). New York's participation in program has enabled it to obtain a partial ($15-$30,000, adjusted family income) or complete ($0-$15,000, adjusted family income) federal contribution for interest on college loans payable during grace periods and 70% of the cost of defaults.* The state absorbs all grace period interest costs not payable by the borrower for vocational school loans as well as the cost of defaults on those loans.

Citizenship or national affinity has been required for student loans since the inception of the program in 1957. Affidavit of J. Wilmer Mirandon, former President of NYHEAC, sworn to July 15, 1975 (A. 82). Applicants were required to be citizens, nationals, or aliens willing to declare their intent to become citizens as soon as possible. Student's Application for Loan Guarantee, Exhibit "B" to Rabinovitch Complaint (A. 26). The requirements for competitive and non-competitive awards established by L. 1969, c. 1154, § 3, adding Art. 13, § 602(2), were extended to student loans by L. 1974, c. 942, § 16, effective July 1, 1975, when the three financial assistance programs were centralized under the jurisdiction of NYSHESC.

Summary of Argument

Citizens and aliens "who are most like" them, *Mathews* v. *Diaz*, —— U.S. —, 96 S. Ct. 1883, 1893 (1976), receive state grants and loans for higher education under Education Law § 661(3). In designating these individuals as the objects of its bounty, New York advances its substantial interests in preserving and strengthening its political community. The alien resident is encouraged to full participation and the quality of the citizenry, both present and

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* The federal expenditure for New York was $67,208,000 in fiscal 1975-76.

future, is enhanced. Although not subject to strict scrutiny because of the inclusion of both citizens and aliens in the benefited class, § 661(3) is nonetheless precisely drawn to effectuate these interests. Only the permanent resident alien who has refused the opportunity to participate fully in the political life of the state and nation is excluded.

POINT I

Education Law § 661(3) does not violate the equal protection clause because it excludes some aliens from state grants and loans for higher education. The citizens and aliens who receive the benefit of the statute advance New York's interests in strengthening its political community and in easing the adjustment of refugees. Although properly reviewed under the traditional equal protection test, Section 661(3) survives strict scrutiny because the state interests are substantial and the classification is precise.

A. The traditional equal protection test requiring a showing of only a reasonable relation to a legitimate state interest is applicable to Education Law § 661(3).

Both citizens and designated classes of aliens obtain competitive and non-competitive grants and loans for higher education under Education Law § 661(3). Aliens willing to apply for citizenship, either at the time they seek financial assistance [§ 661(3)(b)] or when relieved of a disability that precludes naturalization [§ 661(3)(c)], and paroled refugees [§ 661(3)(d)] are eligible. Only permanent resident aliens who refuse naturalization are ineligible. The resulting classification for purposes of equal protection analysis is one based on degree of national affinity, not one "based on alienage." Cf. *Graham* v. *Richardson,* 403 U.S. 365, 372 (1971). See *Friedler* v. *University of New York,* 70 Misc. 2d 446, 333 N.Y.S. 2d 928, 931-32 (Sup. Ct. Erie Co.), holding that Education § 602(3), now § 661(3), did not deny benefits because of alienage and

sustaining the statute under the traditional equal protection test.

The benefited class consists of citizens who necessarily have a complete identification with the United States and "those who are most like citizens" although retaining alien status. *Mathews* v. *Diaz,* —— U.S. —— 96 S. Ct. 1883, 1893 (1976). The alien who states his intention to become naturalized [§ 661(3)(b), (c)] is like the citizen in that he will shed his allegiance to the country of his nationality and attain the same level and quality of identification with this nation as the citizen. See *Harisiades* v. *Shaughnessy,* 342 U.S. 580, 585-86 (1952); *Foley* v. *Connelie,* 419 F. Supp. 889, 898 (S.D.N.Y. 1976) (three-judge court), Jurisdictional Statement filed December 14, 1976. The alien refugee [§ 661(3)(d)] seeks a haven from persecution "on account of race, religion or political opinion" or is "uprooted by catastrophic natural calamity." 8 U.S.C. § 1153(a)(7). *Mathews* v. *Diaz, supra* at 1892; *Rosenberg* v. *Yee Chien Woo,* 402 U.S. 49, 52-53, 55-57 (1971). See Gordon & Rosenfeld, *Immigration Law & Procedure* §§ 2.3i, pp. 2-23—2-23.2, 2.27h (1976 rev. ed) (hereafter "Gordon & Rosenfeld §—, p. —"). The United States has traditionally offered a "humane response" to his plight. *Mathews* v. *Diaz, supra; Rosenberg* v. *Yee Chien Woo, supra.* See *Gordon & Rosenfeld* § 2.3i, pp. 2-23-2-24.2. He is like the citizen in that he depends upon the protection of the same government. Absent that protection, the refugee is literally "homeless," and often stateless. *Rosenberg* v. *Yee Chien Woo, supra* at 52.

Both categories of aliens are unlike the permanent resident who is excluded by § 661(3). The excluded alien has chosen to retain his primary allegiance to the country of his nationality and may seek its protection. *Harisiades* v. *Shaughnessy, supra.* See Harper, *Immigration Laws of the United States,* Part VII, § 1(a), p. 567 (3 ed. 1975).

The traditional equal protection test is applicable to Education Law § 661(3) given that the statute distinguishes

only within the "heterogeneous" class of aliens in the manner just described and does not distinguish between citizens and aliens *vel non.* See *Mathews* v. *Diaz, supra* at 1891, 1892-93. Therein, a Medicare statute, 42 U.S.C. § 1395o(2)(B), authorizing benefits for citizens and aliens with five years permanent residence was reviewed. This Court held that the only question presented was "whether the statutory discrimination *within* the class of aliens—allowing benefits to some aliens but not to others—is permissible," *Id.,* at 1892. (Emphasis original.) The Court then applied Fifth Amendment analogue of the reasonable relation test and sustained the statute. *Id.,* at 1892-93. The instant classification is distinguishable from that involved in *Mathews* v. *Diaz, supra,* only insofar as the benefits authorized by Education Law § 661(3) are provided free (competitive and non-competitive awards), or at minimal cost (student loans), to more aliens.*

Even if Education Law § 661(3) is viewed as establishing a classification "based on alienage," *Graham* v. *Richardson, supra,* the traditional reasonable relation test continues to apply. Narrowly drawn classifications in aid of a state's power to define and preserve its political community are excepted from strict scrutiny notwithstanding their necessary discriminatory effect on aliens. *Sugarman* v. *Dougall,* 413 U.S. 634, 642-643, 647-649 (1973). See *Dunn* v. *Blumstein,* 405 U.S. 330, 344 (1972). Education Law § 661(3) is such a classification. The Legislature has expressly referred to the state's survival as a political entity and to the continuing need for citizen leaders in supporting grants for higher education. L. 1961, c. 389, § 1(a)(b) and (c).** The numerical strength of the electorate and its educational level, interests advanced by § 661(3), are similarly tied to the state's power to define and preserve its political community. See discussion, pp. 12-13.

* Individuals insured under the Medicare Part B program pay half the cost of their premiums. 42 U.S.C. § 1395r(b) (1972 ed. and Supp. IV). *Mathews* v. *Diaz, supra* at 1886 n.1. Education Law § 661(3) does not distinguish between permanent residents and non-immigrant aliens. 8 U.S.C. § 1101(a)(15), (20).

** Subsidized student loans serve the same need.

Additionally, Education Law § 661(3) effects a purely beneficial result and may be excepted from strict scrutiny for this reason alone. The statutes invalidated in this Court's recent decisions involving classifications based on alienage denied aliens' access to the necessities of life, if they became indigent, *Graham* v. *Richardson, supra,* and foreclosed public and private occupations. *Hampton* v. *Mow Sun Wong,* —— U.S. ——, 96 S. Ct. 1895 (1976) (federal civil service); *Sugarman* v. *Dougall, supra* (state civil service); *Examining Board of Engineers, Architects and Surveyors* v. *deOtero,* —— U.S. ——, 96 S. Ct. 2264 (1976) (engineering); *In re Griffiths,* 413 U.S. 717 (1973) (practice of law). See also *Truax* v. *Raich,* 239 U.S. 33 (1915).

Education Law § 661(3) imposes no such denial of access or foreclosure of the means of earning a livelihood. The excluded alien may attend a public or private university in New York at the same tuition rate as the citizen. He is simply not provided with a state subsidized grant or loan in addition. See *Spatt* v. *New York,* 361 F. Supp. 1048, 1053-56 (E.D.N.Y. 1973), aff'd 414 U.S. 1058 (1973), applying reasonable relation test to in-state limitation on use of Regents college scholarships and sustaining limitation. See also *C.D.R. Enterprises* v. *Board of Education of the City of New York,* 412 F. Supp. 1164, 1174-1178 (E.D.N.Y. 1976) (three-judge court, PLATT, D.J., dissenting), Jurisdictional Statement filed June 15, 1976.

If Education Law § 661(3) is closely scrutinized, the inquiry is limited to whether or not the state has shown that its interest in the statute is "both constitutionally permissible and substantial, and that its nse of the classification is 'necessary . . . to the accomplishment' of its purposes on the safeguarding of its interest." *In re*

Griffiths, supra at 721-722 (footnotes omitted). *Examining Board of Engineers, Architects and Surveyors* v. *de-Otero, supra* at 2281; *Sugarman* v. *Dougall, supra* at 642. The state interests advanced by the statute need not be compelling. Compare opinion of the district court, A. 101.

B. State grants and loans for higher education provided for citizens and aliens under Education Law § 661(3) advance New York's interests in strengthening its political community and in easing the adjustment of refugees. The statute's exclusion of permanent resident aliens who refuse naturalization from benefits is both reasonably and precisely related to these state interests.

New York has a vital interest in the definition and preservation of its political community. *Sugarman* v. *Dougall, supra* at 642-643, 647-649. *Dunn* v. *Blumstein, supra* at 344. Its interest in this regard is not merely permissible or substantial but a "matter resting firmly within . . . [its] constitutional prerogatives." *Sugarman* v. *Dougall, supra* at 648. Thus, the state may attempt to expand its electorate by offering incentives to aliens to become naturalized. See *Hampton* v. *Mow Sun Wong, supra* at 1906. It may seek to improve the quality of its citizenry, both present and future, by subsidizing higher education. See *Spatt* v. *New York, supra.* In sum, the state may seek complete political participation from all who reside within its borders to the extent of their individual capacities.

Education Law § 661(3)(a), (b) and (c) bear directly on these interests. Citizens [§ 661(3)(a)] and aliens willing to become citizens [§ 661(3)(b), (c)] receive state subsidies for higher education.* The alien class as so defined has

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* Although state loans unlike awards, or grants, must be repaid, they share some of the same characteristicts. To the extent that state student loans are available under more favorable terms and conditions than commercial loans, the borrower receives a subsidy like the grantee.

received the benefit of State scholarships since 1962, of state loans since 1957 and of TAP awards since 1969. Its inclusion in the programs resulted from deliberate legislative and administrative action in fulfillment of the state interests just described. See discussion, pp. 10-11, 12-13, 15-16, 17.

The Legislature itself expressly identified its support of competitive and non-competitive awards with the preservation of the state's political community, citing *inter alia,* New York's need for a "maximum number" of citizen leaders, and the relationship between the availability of higher education and the "strength" and "survival" of the state and nation as a "democratic" community of "free men". L. 1961, c. 389, § 1(a) and (b) quoted in part at pp. 12-13. The particular citizenship and national affinity requirements adopted in each program themselves demonstrate a concern for attracting new citizens by affording educational opportunities in the immediate interest of the alien and the ultimate interest of the state and nation. See discussion, pp. 10-11, 15-16, 17. *Friedler* v. *University of New York, supra* at 931-932.

The exclusion of the permanent resident alien who refuses naturalization from state grants and loans as a result of Education Law § 661(3) is both reasonable and precise in light of the established nexus between the benefits provided and New York's political interests. As noted, the excluded alien eschews the very identification with the state and the United States which the programs seek to engender. See discussion, pp. 19-20. Although he may contribute to society in "myriad" "ways", *In re Griffiths, supra* at 722, he does not make a contribution consistent with this statutory plan.

Conversely, the inclusion of the paroled refugee absent an express statement of his intent to become a citizen [§ 661(3)(d)] does not affect the validity of the overall

classification. The refugee is more like the citizen than the permanent resident alien who refuses naturalization and thus the distinction drawn between those two classes of aliens is perforce reasonable. See discussion, pp. 19-20, 21. That the parolee's inclusion does not immediately advance the political interests served by § 661(3)(a), (b) and (c) does not imply that no legitimate or substantial state interests are served or that such interests as may be served are inconsistent with ones previously described. The United States and the State of New York has historically offered a "humane response" to the plight of the refugee. See discussion, p. 19. The need for such a response is strengthened by the refugee's status as a parolee because he must await Congressional legislation to adjust his status to immigrant. Compare 8 U.S.C. § 1153(a)(7) (conditional entrant may adjust his status to immigrant after 2 years of continuous physical presence) with § 1182(d)(5) (no parallel provision for parolees). Section 661(3)(d) thus assists the parolee in continuing his education and in obtaining retraining to make his skills more marketable between the time he arrives in New York until he knows, with a reasonable degree of certainty, that he will be able to stay.

Education Law § 661(3) may be sustained even without regard to the specific political and humane interests it reflects. The "conscientious sovereign" may share its bounty with its "own citizens and *some* of its guests." *Mathews* v. *Diaz, supra* at 1891 (Emphasis original). It is not compelled to choose between providing benefits for all citizens and all aliens or no benefits at all. Its decision in this regard may rely solely on the character of the relationship between the alien and his country. "[A]s the alien's tie grows stronger, so does his claim to an equal share" of public benefits. *Mathews* v. *Diaz, supra* at 1891-92. Section 661(3) parallels the *Diaz* formulation exactly and must therefore be sustained. State grants and loans are

provided according to degree of national affinity. "[C]itizens and those who are most like citizens qualify. Those who are less like citizens do not." *Diaz* v. *Mathews, supra* at 1893.

POINT II

Appellee Rabinovitch lacked standing to contest the constitutionality of Education Law § 661(3) insofar as it pertains to state student loans. Appellee did not apply for a loan and both his need for a loan and the anticipated basis of its denial were speculative.

The jurisdiction of a federal district court can be invoked only by a plaintiff who has suffered "some threatened or actual injury resulting from . . . putatively illegal action." *Warth* v. *Seldin,* 422 U.S. 490, 499 (1975), quoting *Linda R.S.* v. *Richard D.,* 410 U.S. 614, 617 (1973). This "personal stake" must be sufficient to justify the exercise of the court's remedial powers. *Warth* v. *Seldin, supra* at 498; *Baker* v. *Carr,* 369 U.S. 186, 204 (1962). Absent this degree of realistic interest, there is no case or controversy within the meaning of Article III of the Federal Constitution. *O'Shea* v. *Littleton,* 414 U.S. 448 (1974).

Plainly, the Article III requirement is not satisfied by a complaint about a practice that has not occasioned the individual plaintiff any injury. *Rizzo* v. *Goode,* —— U.S. —— 44 U.S.L.W. 4095, 4098 (Jan. 21, 1976). Appellee Rabinovitch is in exactly this position with respect to his challenge to Education Law § 661(3) insofar as defines the class of individuals eligible for state student loans. Appellee had not applied for a loan at the time he commenced his action (A. 73), and he did not apply during the course of the proceedings. See *Mathews* v. *Diaz, supra* at 1887 n. 3, 1889, adjudicating claim based on denial of benefits after action was commenced but refusing to consider claims of purported class members "who will be" denied benefits in the

future on the ground that no action had been taken that was tantamount to a denial.

Appellee did not even allege a present need for a loan. He stated only (A. 71): "I believe I may require student loans to help cover the cost of my education." A. 71. The fact that his then current financial circumstances and those of his parents were described in response to interrogatories from NYEAC (A. 74-77) did not establish a present injury. His financial circumstances and/or those of his parents could change by the time the need for a loan actually arose. In light of these considerations, appellee's claim against the citizenship and national affinity requirements for student loans was not ripe when it was adjudicated by the district court. See *Warth* v. *Seldin, supra* at 499.

The Assistant Attorney General was correct in advising the district court that appellee would be denied a loan if he refused to state his intent to become a citizen at the time of his application (A. 98). However, it is equally correct that appellee would be denied a loan if he failed to meet any of the need or responsibility requirements. See generally Student's Application for Loan Guarantee Exhibit "B" to *Rabinovitch* complaint, A. 26-29. Given this range of possibilities, a basis for rejecting appellee as a loan applicant cannot be established in advance of the actual determination. Thus, in adjudicating this claim against Education Law § 661(3), the district court assumed hypothetical facts and "anticipated a question of constitutional law in advance of the necessity of deciding it." *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 346-347 (1936).

Eisenstadt v. *Baird*, 405 U.S. 438 (1972), and *Barrows* v. *Jackson*, 346 U.S. 249 (1953) are not opposed. Regardless of the derivative source of their constitutional claims, plaintiffs in both cases suffered actual injury. Eisenstadt was arrested, and the sale of Barrows' house was jeopardized.

CONCLUSION

For the foregoing reasons the judgment of the District Court should be reversed and Education Law § 661(3)(a), (b) and (c) declared valid under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Dated: New York, New York
January 3, 1977

Respectfully submitted,

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• The Attorney General acknowledges the assistance of Adele Brenner Reiter and Leonard Pugatch, Legal Aides, in the preparation of this brief.

IN THE

Supreme Court of the United States

No. 76-208

EWALD B. NYQUIST, Commissioner of Education of the State of New York, et al.,

Appellants,

v.

JEAN-MARIE MAUCLET,

Appellee,

and

EWALD B. NYQUIST, Commissioner of Education of the State of New York, et al.,

Appellants,

v.

ALAN RABINOVITCH,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURTS FOR THE WESTERN AND EASTERN DISTRICTS OF NEW YORK

BRIEF FOR APPELLEE RABINOVITCH

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. CASES

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BRIEF FOR APPELLEE RABINOVITCH

Introductory Statement

New York State provides three categories of financial assistance to students of colleges, universities and certain vocational schools, namely:

A. Academic performance awards, consisting primarily of Regents College Scholarships awarded to students on

the basis of their performance in a competitive qualifying examination. New York Education Law §§ 605, 670 *et seq.* (McKinney Supp. 1976) (hereinafter referred to as "NYEL").

B. General awards, consisting primarily of tuition assistance program awards which "are available for all students who are enrolled in courses of college or hospital based study and training . . . who demonstrate the ability to complete such courses, in accordance with standards established by the commissioner [of education]." NYEL §§ 604, 667 *et seq.*

C. Student loans to persons attending colleges or vocational institutions to assist them in meeting their expenses. NYEL §§ 680 *et seq.*

The basic qualifications for participation in each of the foregoing programs are contained in NYEL § 661. At issue in this case is the statutory provision, NYEL § 661(3), which excludes from participation in all three financial aid programs all aliens (except "paroled" refugees) who, even though lawfully admitted to permanent residence in the United States and satisfying New York's durational residency requirement (NYEL § 661(5)), are unwilling to become United States citizens and actually acquire citizenship as soon as qualified.

In these two cases[1] on appeal from a single three-judge district court for both the Western and Eastern Districts of New York, appellants seek reversal of the unanimous

[1] The *Rabinovitch* and *Mauclet* cases were independently commenced, some seven months apart (A 1, 3), in two separate district courts. Because the issues tendered were similar, the Chief Judge of the Second Circuit designated the same three judges to hear both cases. (A 1, 4.) Although the two cases were heard together in Brooklyn, New York on July 22, 1975 (A 16), and were disposed of by a single opinion, they were never in fact ordered consolidated for all purposes under Fed. R. Civ. P. 42.

decision below holding NYEL § 661(3) unconstitutional and enjoining its enforcement. Finding that the statute employed a suspect classification, alienage, the district court applied the "strict scrutiny" test in evaluating the statute's constitutionality; it concluded that appellants had failed to meet their burden under that test (and could not even satisfy the less demanding "rational relationship" test). (A 100-101; 406 F. Supp. at 1235.) While the district court awarded appellees the declaratory and injunctive relief they sought, it refused to enter judgment for appellee Rabinovitch against the New York State Higher Education Services Corporation ("NYSHESC") covering the amount of scholarship and tuition assistance funds withheld from him during his first three years of college. (A 101-102; 406 F. Supp. at 1236.) Mr. Rabinovitch has appealed to this Court from that aspect of the judgment below (docket number 75-1809), but the Court has not yet acted on his jurisdictional statement.

The appellants' brief accurately sets forth the opinions below, the basis for this Court's jurisdiction and the undisputed facts of record. (Brief at 2-8.) Accordingly, we set out our view of the issues tendered by this appeal before turning to our argument.

Issues Presented

1. Whether the district court erred in recognizing appellee Rabinovitch's standing to challenge the constitutionality of NYEL § 661(3) insofar as it pertains to student loans.

2. Whether the district court erred in concluding that New York has failed to meet its burden under the Equal Protection Clause of demonstrating that the statutory exclusion of aliens from all forms of student financial aid satisfies a legitimate and substantial state interest and is precisely tailored to achieve that purpose.

3. Whether NYEL § 661(3) conflicts with the exclusive constitutional power of the federal government to regulate the conditions for the entrance and residence of aliens and imposes discriminatory burdens upon aliens in violation of 42 U.S.C. § 1981.[2]

Summary of Argument

1. A single statutory provision, NYEL § 661(3), disqualifies resident aliens unwilling to apply for United States citizenship from participation in all three of New York's programs of aid to students attending institutions of higher education. Appellee Rabinovitch has been denied assistance under both the academic performance and general award programs because of his status as an alien, and the appellants have conceded that if he were to apply for a student loan it would not be granted for the same reason. Indeed, appellee Rabinovitch meets all of the eligibility criteria for a student loan except citizenship.

Under these circumstances, even though he has not actually applied for a loan, appellee Rabinovitch has standing to challenge the constitutionality of NYEL § 661(3) as applied to the student loan program. The performance of pointless, formal acts is not required to acquire standing when there is already real and concrete adverseness resulting from actual injury suffered by application of the challenged statutory provision against the plaintiff. Additionally, as one clearly injured by operation of the statute, appellee Rabinovitch has *jus tertii* standing to challenge NYEL § 661(3) in the context not only of its infringement of his civil rights, but also as it affects the rights of others similarly situated.

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[2] While issue 3 was fully briefed and argued to the court below, the opinion does not discuss it because it disposed of the case on equal protection grounds. This legal contention nonetheless presents an independent ground for affirmance.

2. The citizenship requirement of NYEL § 661(3) deprives appellee Rabinovitch of his right under the Fourteenth Amendment to the equal protection of the laws. The state, having chosen to enact an eligibility requirement with the inherently suspect classification of alienage as the distinguishing characteristic, must satisfy the attendant strict judicial scrutiny test by showing that this classification is necessary to the accomplishment of a constitutionally permissible and substantial state interest.

Appellants have failed to meet this burden insofar as the "special public interest" doctrine, which formerly allowed the states to give preference to its citizens in the distribution of scarce economic resources, has been specifically rejected as a basis for upholding classifications based on alienage. While defining the state's political community is a substantial interest, the purpose of NYEL § 661(3) was not the definition of New York's political community. The legislative history of the financial aid programs demonstrates that the statutory purpose was not the enhancement of the size and education level of the electorate. Furthermore, the political community doctrine does not extend to ordinary legislative measures aimed at increasing voter registration and intelligence. Nor is the statute's purported purpose of expanding the electorate by "offering incentives to aliens to become naturalized" a legitimate state interest. Programs which withhold benefits from aliens in order to foster national citizenship are only justified if they serve a national interest, the advancement of which is not a legitimate state purpose.

Even if a statute serves a legitimate and substantial state interest, when a suspect classification is employed the state must also demonstrate that it is narrowly and precisely drawn to accomplish the implementation of that purpose. NYEL § 661(3) is not even rationally related to achieving the state's purported purpose because it does not require or guarantee that students receiving assistance

will remain in New York and participate in the political community.

3. NYEL § 661(3) conflicts with the exclusive constitutional power of the federal government to regulate the conditions for the entrance and residence of aliens, and imposes discriminatory burdens upon aliens in violation of 42 U.S.C. § 1981. A state can neither add to nor take from the conditions lawfully imposed on aliens by the federal government upon admission to and residence in the United States.

New York State has imposed an impermissible, auxiliary burden upon the entrance and residence of aliens within its borders by placing an often insurmountable burden in their path to full human development and economic security via higher education. Insofar as the state distinguishes between citizens and resident aliens (and between aliens) on the ground of the greater allegiance to the United States of the citizen, it acts in a manner inconsistent with federal law, as the Immigration and Nationality Act already makes suitable provision for excluding those persons of questionable allegiance to the United States. Moreover, in the area of federally guaranteed student loans, the New York citizenship restriction conflicts with a specific federal regulation.

ARGUMENT

I. Appellee Rabinovitch has the requisite standing to challenge the constitutionality of NYEL § 661(3) insofar as it pertains to student loans.

Though appellee Rabinovitch has actually been injured by the challenged statute in connection with two of New York's three programs of financial aid to students, namely, the academic performance and general awards programs, appellants continue to urge that he lacks standing to

challenge[3] NYEL § 661(3) insofar as it excludes aliens from receiving student loans. Noting that at oral argument "the state admitted that had Rabinovitch applied for a student loan, and refused to make the required statement of intention to become a United States citizen, his application would have been refused" (A 98; 406 F. Supp. at 1235), the court below concluded:

> "Nothing would be gained by adjudicating the statute as it applies to all but one aspect of the assistance program. Both plaintiffs allege injuries from this statute. Both would be further injured were they to apply for student loans. We feel that this is a proper case in which to apply the expanded concept of standing and allow these plaintiffs to assert the rights of those aliens who are injured by this statute with regard to loans. *Eisenstadt* v. *Baird,* 405 U.S. 438, 443-46 (1972); *Barrows* v. *Jackson,* 346 U.S. 249 (1953)." (A 99; 406 F. Supp. at 1235.)

The constitutional law of standing has never required a plaintiff to engage in pointless, fruitless acts as a prerequisite to the assertion of constitutional rights. *See, e.g., Hailes* v. *United States Air Lines,* 464 F.2d 1006, 1008 (5th Cir. 1972). *Cf. Regional Rail Reorganization Act Cases,* 419 U.S. 102, 143 (1975).[4] To require appellee to go through the formal motions of submitting an application for a student loan, with full knowledge of the cer-

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[3] Whether appellants mean that appellee's claim is constitutionally insufficient under the case or controversy limitation of Article III, or only that it is not yet ripe for review, is never made clear. (*See* Appellants' Brief at pp. 25-26.)

[4] Appellants' citation of *Mathews* v. *Diaz,* 426 U.S. 67 (1976) (Brief at 25), in support of their argument is erroneous. The district court in *Diaz* did not have jurisdiction over the claims of the class who "will be denied enrollment" because 42 U.S.C. § 405 (g), the relevant jurisdictional statute in that case, required a final decision by the Secretary of the Department of Health, Education and Welfare after a hearing as a prerequisite to jurisdiction. *See id.* at 71-72 n.3.

tainty of its denial on the grounds of his alienage, would be to require the performance of a meaningless act which would add absolutely nothing to the real and concrete adverseness of the extant controversy already before the Court.

We are here dealing with a single statutory proscription applicable to all aid programs. If the statute is unconstitutional as applied in the case of scholarships and tuition assistance, there is no possibility that it could survive a similar challenge as applied to student loans. It would, therefore, serve no purpose to require piecemeal litigation of the statute's constitutionality.

Furthermore, on the record before the Court it appears that appellee does in fact satisfy all of the requisite eligibility criteria for a student loan, other than citizenship. To qualify for a loan (without regard to interest benefits) a student must demonstrate only "a sense of responsibility toward repayment", bona fide New York residency, and enrollment or acceptance for admittance as a full time student at an approved college. *See* NYEL § 680.1.a; A 28-29. Appellee clearly satisfies all these criteria.

Appellants point to the possibility that appellee might fail to meet the "need or responsibility requirements" for a loan. (Appellants' Brief at 26.) First, there is no "need" requirement in order to qualify for a loan. The criteria of "need" only comes into play when an applicant also seeks interest benefits. *See* A 29; Appellants' Brief at 16-17; NYEL § 680.1.a, b. Second, predicating lack of standing on the ground that appellee may not have "a sincere sense of responsibility toward repayment" (A 28) is frivolous. It is quite clear that appellee's failure to state his intent to become a citizen would result in a denial of his loan request without any further examination into his "sense of responsibility."

Further, this Court has frequently held that one injured by operation of a statute has standing to challenge it in

the context not only of its infringement of his civil rights but also as it affects the rights of others similarly affected.[5] To the extent that such standing has been confined within certain limits by the Court, such

> "limitations on a litigant's assertion of *jus tertii* are not constitutionally mandated, but rather stem from a salutary 'rule of self restraint' designed to minimize unwarranted intervention into controversies where the applicable constitutional questions are ill-defined and speculative." *Craig* v. *Boren, supra,* 45 U.S.L.W. at 4058.

It cannot be said that the "applicable constitutional questions are ill-defined and speculative" insofar as they relate to student loans; indeed, they are identical in both the scholarship and loan areas. As the Court recently observed:

> "In such circumstances, a decision . . . to forego consideration of the constitutional merits [of the citizenship requirement for student loans] in order to await the initiation of a new challenge to the statute by injured third parties [aliens whose applications for loans were actually rejected] would be impermissibly to foster repetitive and time consuming litigation under the guise of caution and prudence." *Id.*

Moreover, since the "applicable constitutional questions have been . . . presented vigorously and 'cogently,' . . . the denial of *jus tertii* standing in deference to a direct class suit can serve no functional purpose" in this case. *Id.*

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[5] *See Craig* v. *Boren,* 45 U.S.L.W. 4057 (U.S. Dec. 20, 1976); *Roe* v. *Wade,* 410 U.S. 113 (1973); *Trafficante* v. *Metropolitan Life Ins. Co.,* 409 U.S. 205 (1972); *Eisenstadt* v. *Baird,* 405 U.S. 438, 445 (1972); *Griswold* v. *Connecticut,* 381 U.S. 479 (1965); *NAACP* v. *Alabama,* 357 U.S. 449 (1958); *Barrows* v. *Jackson,* 346 U.S. 249 (1943). *See also* Note, *Standing to Assert Constitutional Jus Tertii,* 88 Harv. L. Rev. 423 (1974).

II. NYEL § 661(3) is unconstitutional because it deprives appellee Rabinovitch of his right under the Fourteenth Amendment to the equal protection of the laws.

A. The Fourteenth Amendment protects citizens and aliens alike.

It is now well settled that the reference to "person" in the Fourteenth Amendment's Equal Protection Clause[6] includes aliens as well as citizens. *Graham* v. *Richardson*, 403 U.S. 365, 371 (1971). As this Court has noted, "once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders." *Hellenic Lines Ltd.* v. *Rhoditis*, 398 U.S. 306, 309 n.5 (1970), *quoting from*, *Bridges* v. *Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring). As such, appellee Rabinovitch is entitled to demand and receive equal treatment under the law. *See* 42 U.S.C. § 1981.[7] The question to be resolved, therefore, is whether NYEL § 661(3) offends that principle.

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[6] The Fourteenth Amendment provides, *inter alia*, that no state shall "deny to any person with its jurisdiction the equal protection of the laws."

[7] Indeed, the principle of equal protection for the alien dates back at least to the Mosaic Code as recorded in the Old Testament. There are at least two references to the subject in the Bible:

> "And if a stranger sojourn with thee in your land, ye shall not vex him. But the stranger that dwelleth with you shall be unto you as one born among you, and thou shalt love him as thyself: for ye were strangers in the land of Egypt. . . ." (Leviticus 19:33 and 34.)
>
> "Ye shall have one manner of law, as well for the stranger, as for the native." (Leviticus 24:22.)

B. A legislative classification based upon alienage must necessarily and precisely advance a legitimate and substantial state interest.

Just last term the Court reaffirmed the principle that "state classifications based on alienage are subject to 'strict judicial scrutiny.'" *Examining Board* v. *de Otero*, 96 S. Ct. 2264, 2281 (1976). That rule derives from the fact that classifications based on alienage as the distinguishing characteristic, like those based upon color, race or national origin "are inherently suspect. . . . Aliens as a class are a prime example of a 'discreet and insular' minority for whom such heightened judicial solicitude is appropriate." *Graham* v. *Richardson, supra*, 403 U.S. at 372. *Accord, Sugarman* v. *Dougall*, 413 U.S. 634, 642 (1973). A state which incorporates a suspect classification into its laws "'bears a heavy burden of justification.' *McLaughlin* v. *Florida*, 379 U.S. 184, 196 (1964)." *In re Griffiths*, 413 U.S. 717, 721 (1973).

Before the state may impose special burdens on aliens or withhold from them benefits otherwise generally available, it must demonstrate that

> "its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest." *In re Griffiths, supra*, 413 U.S. at 721-22.

See also Examining Board v. *de Otero, supra*, 96 S. Ct. at 2281. Though the state interest required to satisfy the strict scrutiny standard has been variously characterized as "overriding", *McLaughlin* v. *Florida, supra*, 379 U.S. at 196, "compelling", *Graham* v. *Richardson, supra*, 403 U.S. at 375, "important", *Dunn* v. *Blumstein*, 405 U.S. 330, 343 (1972), or "substantial", *In re Griffiths, supra*, 413 U.S. at 721, the Court has indicated that "no particular significance" is to be attached to these differences in articulating the same test. *Id.* at 722 n.9. (*See* A 101 and Appellants'

Brief at 22.) What the Constitution demands is that

> "the governmental interest claimed to justify the discrimination is to be carefully examined in order to determine whether that interest is legitimate and substantial, and inquiry must be made whether the means adopted to achieve the goal are necessary and precisely drawn." *Examining Board* v. *de Otero, supra*, 96 S. Ct. at 2282-83.

Appellants offer three reasons why the strict scrutiny standard should not be applied in this case. First, they contend that the statutory classification is not suspect because alienage is not the distinguishing characteristic. *See Friedler* v. *University of State of New York*, 70 Misc. 2d 416, 418, 333 N.Y.S.2d 928, 931 (Sup. Ct. Erie Co. 1972). Relying upon *Mathews* v. *Diaz, supra*, appellants argue that NYEL § 661(3) "distinguishes only within the 'heterogenous' class of aliens . . . and does not distinguish between citizens and aliens *vel non*." (Brief at 19-20.) Second, they argue that the purpose of the statutory classification is the preservation of the state's "political community."[8] (Brief at 20.) Third, appellants contend that the subject statute involves aid to higher education rather than the denial of welfare benefits ("the necessities of life") or the foreclosure of "public and private occupations". (Brief at 21.) We submit that none of appellants' arguments support the conclusion that NYEL § 661(3) is "excepted from strict scrutiny." (Brief at 20, 21.)

1. The appellants' first contention is premised on the assumption that it is not the fact of foreign citizenship

[8] Considered as a statement of fact reflective of governmental intent at the time of enactment, we do not agree that preservation or enhancement of its "political community" was what the legislative and executive branches of the New York State government intended when they enacted the citizenship restriction now codified as NYEL § 661(3). *See infra* at pp. 18-22. The "political community" rationale is simply an argument advanced in the face of litigation.

which is critical but the unwillingness to apply for American citizenship as soon as one is able. The classification is thereby made to hinge not on the affirmative factor of alienage, but on the negative lack of American citizenship or "affinity." (Appellants' Brief at 18.) This formulation is but the converse of the same discriminatory pattern which has been repeatedly denounced in the decisions of this Court, and it is sophistical in the extreme to rescramble the words and term the practice legitimate.

The fact that New York's statutory classification is between citizens and those resident aliens able and willing to become American citizens on the one hand, and resident aliens not so willing on the other, is not constitutionally significant. In *Takahashi* v. *Fish & Game Comm'n*, 334 U.S. 410 (1948), the division was between citizens and resident aliens eligible for United States citizenship, and ineligible resident aliens. That statutory distinction closely resembles the current case, and *Takahashi* clearly holds that kind of statutory discrimination invidious. Thus, the fact that the classification found in NYEL § 661(3) is not exactly between alien and citizen cannot be used as a mitigating shield to justify the use of a less than stringent constitutional analysis. *See also Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886) (municipal ordinance discriminatorily enforced only against Chinese aliens); *Graham* v. *Richardson, supra* (Arizona statute distinguished between citizens and aliens with 15 years residency in the United States and all other aliens).[9]

This Court's decision in *Mathews* v. *Diaz, supra*, dealing as it did with the power of the federal government to regulate the right of classes of aliens to receive federal benefits, lends no support to appellants. As the Court pointed out in part IV of its unanimous opinion, "the Fourteenth Amendment's limits on state powers are sub-

[9] *See also Hosier* v. *Evans*, 314 F. Supp. 316 (D.V.I. 1970); *Williams* v. *Williams*, 328 F. Supp. 1380 (D.V.I. 1971); *Sailer* v. *Tonkin*, 356 F. Supp. 72 (D.V.I. 1973).

stantially different from the constitutional provisions applicable to the federal power over immigration and naturalization." 426 U.S. at 86-87. Since "it is the business of the political branches of the Federal Government, rather than that of . . . the States . . . to regulate the conditions of entry and residence of aliens," *id.* at 84,

> "a division by a State of the category of persons who are not citizens of that State into subcategories of United States citizens and aliens has no apparent justification, whereas a comparable classification by the Federal Government is a routine and normally legitimate part of its business." *Id.* at 85.

See also Hampton v. *Mow Sun Wong*, 426 U.S. 88, 101, 116 (1976).

2. The fact that NYEL § 661(3) is allegedly designed to enhance and preserve the political community that is New York State does not exempt the statute from the strict scrutiny test.

> "The appropriate standard of judicial review is determined, not by the strength of the public interest sought to be protected, but rather by the nature of the right (fundamental or not) being regulated and/or the type of classification (suspect or not) which the regulation creates." *Norwick* v. *Nyquist*, 417 F. Supp. 913, 918 (S.D.N.Y. 1976) (three-judge court), *appeal docketed*, 45 U.S.L.W. 3437 (U.S. Dec. 21, 1976) (No. 76-808).

Since the statute here at issue incorporates a suspect classification, the appropriate standard of review is the strict scrutiny test.

While state statutes prescribing the qualifications for voters and "elective or important nonelective executive, legislative, and judicial" officers will not be subjected to the "demanding" degree of scrutiny otherwise employed in evaluating statutes which incorporate a suspect classification, *Sugarman* v. *Dougall*, *supra*, 413 U.S. at 647-48, the statute here at issue does not benefit from that rule because it does not speak directly to a person's "participation in [the state's] democratic political institutions." *Id.* at 648. Furthermore, even those state statutes which in fact are aimed at defining a state's political community are subject to strict scrutiny. What the Court has indicated is only that such statutes will be found to serve a "substantial purpose"; they are nonetheless to be strictly scrutinized (though with less than demanding exactitude) if they employ a suspect classification in order to determine whether the discriminatory means employed is "precisely drawn in light of the acknowledged purpose." *Id.* at 643.

3. Since it is the employment by the state of a suspect classification that calls forth the strict scrutiny standard, it makes no difference that in previous cases the burdens imposed or benefits denied were different from the educational aid payments here at stake. The test remains the same; the only area of possible difference relates to the substantiality of the state interest sought to be achieved.

Furthermore, even though access to public education has been held not to be a fundamental right guaranteed by the Constitution, *San Antonio School District* v. *Rodriguez*, 411 U.S. 1 (1973), education is certainly "vital to existence."

> "It requires no argument to demonstrate that education is vital and, indeed, basic to civilized society. Without sufficient education the plaintiffs would not be able to earn an adequate livelihood, to enjoy life to the fullest, or to fulfill as completely as possible the duties and responsibilities of good citizens."[10] *Dixon*

[10] The principle applies whether one is concerned with "good citizens" or with good members of the community be they citizens or resident aliens.

v. *Alabama State Board of Education*, 294 F.2d 150, 157 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).[11]

As this Court has acknowledged: "Today, education is perhaps the most important function of state and local governments. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Brown* v. *Board of Education*, 347 U.S. 483, 493 (1954).

The educational assistance funds at issue in this case are often the key which opens the door to education. (See *infra* n.21 at p. 31.) Without assistance appellee Rabinovitch may not be able to continue his education[12] or pursue it in the institution of higher learning in New York which offers the best course of study in his field of specialization. (*See* A 70-71.) We can frankly see no constitutional difference between access to educational assistance and access to public assistance, the professions or a job. It can hardly be argued that the right to practice (*e.g.*, law or civil engineering) or hold a specific job (*e.g.*, a civil service position) is any more "vital" than the right to receive scholarship assistance. Since those state enactments were required to meet the strict scrutiny test, so too should NYEL § 661(3).

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[11] At issue in *Dixon* was "the right to remain at a public institution of higher learning . . ." 294 F.2d at 157.

[12] When the case began, Brooklyn College, which appellee attends, was a tuition free institution within the City University of New York City. However, due to New York City's financial crisis, substantial tuition charges have now been imposed. Thus appellee must now pay $925 per year in tuition (*see infra* n. 21 at p. 31), a serious burden considering that the total adjusted gross income before taxes of appellee's family of four is only about $13,000. (A 76.)

C. NYEL § 661(3) does not promote a legitimate and substantial state interest and is not narrowly and precisely drawn to promote the achievement of its purported purpose.

1. The state interest served is not substantial.

Does New York's exclusion of lawfully admitted resident aliens who meet its durational residency requirement (NYEL § 661(5)) from all forms of assistance for higher education serve a legitimate and substantial state interest? That question was specifically addressed by the court below which unanimously concluded that appellants "failed to meet this burden. . . . [T]he State has not demonstrated a compelling interest justifying its discriminatory classification." (A 100, 101; 406 F. Supp. at 1236.) We submit that that holding is clearly correct and should be affirmed.

Neither reason appellants have advanced (Brief at 22-24) supports the constitutionality of NYEL § 661(3).

a. The "special public interest" doctrine is dead.

The "special public interest" doctrine, which held that a state government was justified in giving preference to citizens in the distribution of scarce economic resources—*see Crane* v. *New York*, 239 U.S. 195 (1915)—has been specifically rejected as a basis for upholding classifications based on alienage. *Graham* v. *Richardson, supra*, 403 U.S. at 375. There "can be no 'special public interest' in tax revenues to which aliens have contributed on an equal basis with the residents of the State." *Id.* at 376. *Accord, Sugarman* v. *Dougall, supra*, 413 U.S. at 644-45; *C.D.R. Enterprises, Ltd.* v. *Board of Education*, 412 F. Supp. 1164, 1169-70 (E.D.N.Y. 1976) (three-judge court), *aff'd*, 45 U.S.L.W. 3462 (U.S. Jan. 11, 1977) (the right-privilege and special public interest doctrines "are not simply moribund; we believe they are dead.")

b. The statute does not come within the "political community" doctrine.

The appellants argue that NYEL § 661(3) is aimed at "preserving and strengthening . . . [New York's] political community." (Brief at 17.) They contend that the statute is intended to enhance the "numerical strength of the electorate and its educational level." (Brief at 20-21; *see also id.* at 22-23.) We do not agree that the intended purpose of NYEL § 661(3) and its predecessors was to preserve and strengthen the New York political community. In addition, the political community doctrine recognized by this Court does not encompass legislation designed to increase the number and educational level of a state's electorate.

(i) Neither NYEL § 661(3) nor the state's overall program of financial aid are in fact aimed at enhancing the state's political community.

1. While the appellants' recitation of the historical antecedents of NYEL § 661(3) is accurate as to the particulars of previous statutory and administrative enactments, it does not accurately convey the governmental intent of the legislative and executive branches as to the purpose of the citizenship requirement. Though there has been some statutory or administrative provision requiring discrimination against aliens since 1920, no statement of governmental intent has ever been issued articulating the reason for and purpose served by the proscription. Not once in the 57 years since its original enactment in 1920 has the state ever explained the goals sought to be achieved by the restriction. Appellants have pointed to no such specific statement of policy (*see* Brief at 9-17) and our independent research has failed to reveal any.[13]

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[13] The present statutory provision dates from the 1969 revision of the Education Law. L. 1969, c. 1154. There is no legislative history explaining why or for what reason that provision was in-

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2. If we look to the general purposes sought to be advanced by New York's program of financial assistance for students of institutions of higher education, we find that enhancement of the state's political community is not mentioned and that the exclusion of aliens as required by NYEL § 661(3) runs counter to the general purposes of the program. The predecessor of NYSHESC was established in 1957. L. 1957, c. 367. The purpose of the corporation was "to improve the higher educational opportunities of persons who are residents of this State, and who are attending or plan to attend colleges in this State or elsewhere, by lending funds to such persons to assist them in meeting their expenses of higher education." L. 1957, c. 367, § 1. Enacted as part of the 1957 program for higher education, the objective of the legislation was "'to make sure that *no qualified young person in the State* is denied education beyond high school because of lack of facilities or because of inability to pay for it.'" Joint statement by O. D. Heck, Speaker of the Assembly, and W. J. Mahoney, Senate Majority Leader, 1957 New York State Legislative Annual 155; emphasis supplied.[14]

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cluded. Indeed, there is no reference at all to adding such a limitation in any of the study reports or legislative memoranda on higher education issued at or about the same time. ***See Freedom to Pursue a College Education,*** Recommendations by the State Board of Regents for Modifying and Extending New York State's Student Financial Aid Program (University of State of New York, State Education Department, Albany, 1967); ***New York State and Private Higher Education,*** Report of the Select Committee on the Future of Private and Independent Higher Education in New York State (1968); ***Report of the Joint Legislative Committee to Revise and Simplify The Education Law,*** Legislative Document (1968) No. 84; ***Memorandum of Joint Legislative Committee to Revise and Simplify the Education Law,*** 1969 New York State Legislative Annual 214-15; ***Report of the Joint Legislative Committee on Higher Education,*** Legislative Document (1970) No. 26.

[14] *See also* the 1956 memorandum of appellant Nyquist commenting on L. 1956, c. 798, establishing engineering scholarships, wherein he wrote: "This State is committed to the policy of ex-

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The student aid program was expanded in 1961. L. 1961, c. 392. That legislation was characterized by the governor as representing "a major breakthrough in New York's efforts to assure an opportunity for higher education to *every young man and woman in the State* who has the ability and desire to achieve it." Memorandum of Governor Rockefeller, McKinney's 1961 Session Laws of New York at 2103; emphasis supplied. *See also id.* at 2105. The major change effected by the 1961 legislation was creation of non-competitive tuition assistance awards (then termed "scholar incentive" awards). The memorandum of the State Education Department in support of the scholar incentive plan noted that "[i]f this bill becomes law, any student who has the ability and the incentive to undertake college education is provided with initial funds to enable him to embark upon such a career. . . . Hence, the State has embarked upon this program which grants *opportunities to every child.*" McKinney's 1961 Session Laws of New York at 1963; emphasis supplied.

The legislative purposes as spelled out in 1961 did not include enhancing the political community by increasing the number and education level of voters. Rather, the legislature sought to make higher education available to "all who have the desire and the capacity." L. 1961, c. 389, § 1(a). The overriding purpose of the program was "to develop fully" a "reservoir of talent and future leadership." L. 1961, c. 389, § 1(c). *See also* L. 1961, c. 389, § 1(e).[15]

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tending educational opportunity to all within the State who desire and can profit from it, irrespective of their social status, race, color, creed or religion." 1956 New York State Legislative Annual 146.

[15] The only use of the word "citizen" in the entire legislative history of New York's financial aid programs occurs in one sentence in Section 1(a) of the legislature's 1961 declaration of purposes: "The future progress of the state and nation and the general welfare of the people depend upon the individual development of the

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When the program of financial assistance was revised in 1969 this general purpose continued to serve as the guiding principle. Governor Rockefeller, in signing the bill, L. 1969, c. 1154, noted that it would do much "to further New York State's goal that no young man or woman with the capacity and the desire to seek a college education should be prevented from doing so for lack of financial resources." 2 McKinney's 1969 Session Laws of New York at 2588. *See also* Memorandum of Governor Wilson pertaining to the 1974 revision of Articles 13 and 14 of the Education Law, L. 1974, c. 942, 2 McKinney's 1974 Session Laws of New York at 2117.

3. The history of the citizenship restriction itself runs counter to the presently articulated purposes for NYEL § 661(3). While initially imposed in 1920, L. 1920, c. 502, § 1, the class of persons eligible for scholarships was expanded in 1957 to include "minors and natural children of parents, at least one of whom is a citizen." L. 1957, c. 756, § 4. In 1959 it was again expanded to include minors and natural children of parents "at least one of whom has duly declared intention of becoming . . . [a] citizen in accordance with law." L. 1959, c. 479, § 1. Thus, even resident aliens unwilling to become citizens were eligible for scholarships from 1957 until 1962 when adoption of the Regents' Rule, 8 N.Y.C.R.R. § 145.4 (1962), limited scholarship to citizens and aliens willing to become citizens.

When the tuition assistance (or scholar incentive) program first came into being in 1961, there was no statutory

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maximum number of citizens to provide the broad range of leadership, inventive genius, and source of economic and cultural growth for oncoming generations." L. 1961, c. 389, § 1(a). Read in context, it is hard to understand why appellants rely upon it (*see* Appellants' Brief at 12, 20-21, 23) as evidencing the fact that the purpose of the state's aid programs was simply the development of more and better voters.

citizenship requirement and, as appellants concede (Brief at 15), the Regents' Rule concerning citizenship did not cover scholar incentive awards—which awards have always constituted the bulk of the funds available under the overall aid program. (*See* Appellants' Brief at 8.) Thus, between 1961 and 1969, resident aliens were provided with scholar incentive awards even though they had no intention of joining or participating in the political community.

4. Based on the foregoing analysis, certain conclusions emerge: First, there has never been a legislative or executive declaration explaining the purpose of NYEL § 661(3) or its predecessors. Second, the general purpose served by the state's overall aid program is to provide assistance to all with the requisite desire and capacity in order to secure the broad benefits that result from an educated populace. Third, the exclusion of aliens has not been a consistent policy; aliens have previously been the recipients of both scholarships and tuition assistance. Our ultimate conclusion is that NYEL § 661(3) serves no purpose save to discriminate against aliens simply because of their status as citizens of another country[16]—a purpose not permitted under the Fourteenth Amendment. *See In re Griffiths, supra,* 413 U.S. at 722 n.8.

(ii) The political community doctrine recognized by this Court does not encompass legislation designed to increase the number and educational level of a state's electorate.

The power to define its political community, recognized as a substantial state interest in *Sugarman* v. *Dougall, supra,* 413 U.S. at 643, does not encompass the enhancement of the number and educational level of a state's electorate.

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[16] *See* Memorandum of the State Department of Education, 1964 New York State Legislative Annual 209-10.

The political community doctrine is intended to recognize the substantial nature of the state's interest "in establishing its own form of government and in limiting participation in that government to those who are within 'the basic conception of a political community.' *Dunn* v. *Blumstein,* 405 U.S. 330, 344 (1972)." *Id.* at 642. Thus this Court has indicated that when a state acts to establish the qualifications for voters, elected officials, important non-elected officials "who participate directly in the formulation, execution or review of broad public policy," it is defining its political community and acting to carry out a substantial state interest. *Id.* at 647-49. *See also In re Griffiths, supra,* 413 U.S. at 729; *Foley* v. *Connelie,* 419 F. Supp. 889, 901 (S.D.N.Y. 1976) (Mansfield, J., dissenting) (three-judge court), *appeal docketed,* 45 U.S.L.W. 3449 (U.S. Jan. 4, 1977) (No. 76-839).[17] The doctrine has never been extended to include measures designed to encourage voter registration and education. Such measures do not involve the state's "constitutional prerogatives" to establish its own form of government and political institutions. *Sugarman* v. *Dougall, supra,* 413 U.S. at 642, 648.

To equate the state interest here asserted with the political community concept as previously defined by the Court would be to recast the doctrine so that virtually any state statute which could even arguably be said to "encourage" voter registration or education would have to be regarded as furthering a substantial state interest. The exception would then engulf the rule. Indeed, New York's uniform response to the recent spate of litigation challenging its

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[17] While the political community concept has recently been construed to include the establishment of the qualifications for state jurors, *Perkins* v. *Smith,* 370 F. Supp. 134 (D. Md. 1974) (three-judge court), *aff'd* 96 S. Ct. 2616 (1976), it does not include the establishment of the qualifications of attorneys, *In re Griffiths, supra,* or notaries public. *Taggart* v. *Mandel,* 391 F. Supp. 732 (D. Md. 1975).

various statutory exclusions of aliens has been to assert the political community purpose in support of virtually all such legislative classifications.[18] We submit that appellants have offered no reason whatever for thus expanding a salutory principle of federal-state comity under the Fourteenth Amendment to include even routine state measures.

2. The state interest served is not legitimate.

When appellants speak of the state attempting "to expand its electorate by offering incentives to aliens to become naturalized" (Brief at 22), they are, of necessity, admitting that the state is seeking to compel aliens to become United States citizens. This Court has, however, held that programs which withhold benefits from aliens in order to foster national citizenship are only justified if they serve a national interest, and the national interest can only be articulated by the President and the Congress. The advancement of such a national interest is not a legitimate state function. *See Hampton* v. *Mow Sun Wong, supra,* 426 U.S. at 95-96, 101; *Mathews* v. *Diaz, supra,* 426 U.S. at 85.

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[18] *See Surmeli* v. *New York,* 412 F. Supp. 394 (S.D.N.Y. 1976) (practice of medicine limited to citizens and resident aliens who become citizens within ten years of licensure); *Norwick* v. *Nyquist, supra* (aliens precluded from teaching in New York public schools); *Foley* v. *Connelie, supra* (upholding by a 2-1 vote the constitutionality of a New York statute excluding aliens from employment as New York State police officers; Circuit Judge Mansfield filed a strong dissent); *Kulkarni* v. *Nyquist,* —— F. Supp. —— (76-CV-344 and 76-CV-360; January 5, 1977) (N.D.N.Y.) (practice of both civil engineering and physical therapy limited to citizens). The only recent case in which the argument was apparently not made was *C.D.R. Enterprises, Ltd.* v. *Board of Education, supra.*

This ubiquitous use of the political community rationale further undermines the appellants' argument that enhancement of New York's political community is the intended statutory purpose of NYEL § 661(3).

In *Hampton* the Civil Service Commission advanced several interests which it asserted were sufficient to justify the exclusion of non-citizens from the federal civil service. It was argued that "reserving the federal service for citizens provides an appropriate incentive to qualify for naturalization and thereby to participate more effectively in our society." 426 U.S. at 104. The Court assumed without deciding that if Congress or the President had expressly imposed the citizenship requirement, it would be justified by the national interest in providing an incentive for aliens to become naturalized. *Id.* at 105. However, the Court noted that that interest was not a matter which is properly the business of the Civil Service Commission. *Id.* at 116. Additionally, the court noted that "there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State." *Id.* at 100. Accordingly, we submit that fostering national citizenship is not a legitimate state concern. *Cf. Jones* v. *Wade,* 479 F.2d 1176, 1179 n.1 (5th Cir. 1973) (interest in requiring proper respect for the United States flag is to a large extent properly a federal interest; state interest, if any, is subject to strict limitation).

3. The statute is not narrowly and precisely drawn to accomplish its articulated goals.

We submit, as the court below concluded, that NYEL § 661(3) is not narrowly and precisely drawn to accomplish its articulated goals. Indeed, we do not believe that this statute can even survive under the rational relationship standard.

First, though the state claims it is seeking to enhance the size and education level of its electorate, NYEL § 661(3) does not require aid recipients to register and vote in state elections. Moreover, pursuant to Section 168 of the New York Election Law, the education level

necessary for voting in New York elections is only the completion of the sixth grade.[19]

Second, there is no requirement in New York's financial aid programs that any student who receives assistance must remain in New York and participate in any way in the "political community." Appellee and his family have lived in New York for thirteen years and have contributed directly and indirectly to the well-being of the community in which they reside. Nonetheless, appellee has been excluded from receiving any form of educational assistance. On the other hand, an American citizen who may have lived elsewhere all of his life and who, therefore, together with his family, has contributed much less to the well-being of the community, is entitled to the full panoply of assistance after only approximately nine months residence in the state. NYEL § 661(5). Indeed, while appellee presently intends to continue to reside in New York after graduation (A 69), the citizen may, and is in fact free to, leave New York after the receipt of thousands of dollars of educational assistance. The appellee will continue to contribute to the well-being of the state and will use within the state the knowledge and skills acquired in college; the citizen may well leave New York after graduation and take with him the benefits derived from the funds received and never make any contribution to the community.

Third, New York in fact does not even limit its aid to those who pursue their studies in the state. Assistance under the student loan program is given to New York residents for study in institutions of higher learning located in New York "or elsewhere." NYEL § 680.1.a.

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[19] Indeed, pursuant to Section 4(e) of the federal Voting Rights Act, 42 U.S.C. § 1973b(e), the sixth grade standard may even be satisfied via completion of studies in Spanish in public or private schools accredited by the Commonwealth of Puerto Rico. *See Katzenbach* v. *Morgan*, 384 U.S. 641 (1966).

Fourth, by including the paroled refugee category within the class of eligible recipients, New York may well have acted humanely, but it has undermined its stated purpose. There is no way that New York can act to change the status of such refugees and make them eligible for citizenship—only the federal government can bring about that result. By including this group within the covered class, New York accords non-citizens who cannot presently even qualify for citizenship and participation in the political community a benefit which long time resident alien taxpayers, such as appellee, are precluded from receiving.

The foregoing result is simply not constitutionally permissible under any Fourteenth Amendment standard. Citizenship does not "in anyway causally relat[e] to or guarante[e] political involvement." *Kulkarni* v. *Nyquist, supra,* slip opinion at 5. Indeed it is not even a "guarantee" that a person will continue to reside in any state "or even in the United States." *Examining Board* v. *de Otero, supra,* 96 S. Ct. at 2283. As such,

> "there is little, if any, basis for [a state] treating persons who are citizens of another State differently from persons who are citizens of another country. Both groups are noncitizens as far as the State's interests in administering its welfare [or educational aid] programs are concerned." *Mathews* v. *Diaz, supra,* 426 U.S. at 85.

Two lower courts have already considered classifications similar to the one here at issue and in both cases the statutes were struck down as unconstitutional. *Chapman* v. *Gerard,* 456 F.2d 577 (3d Cir. 1972) (aliens barred from participation in Virgin Islands territorial scholarship fund); and *Jagnandan* v. *Giles,* 379 F. Supp. 1178 (N.D. Miss. 1974) (three-judge court), *aff'd as to damages,* 538 F.2d 1166 (5th Cir. 1976) *pet. for cert. filed,* 45 U.S.L.W.

3449 (U.S. Jan. 4, 1977) (state statute classifying aliens as non-residents for the purpose of charging higher tuition and fees to attend state supported institutions of higher education).

We submit the NYEL § 661(3) is clearly not structured to precisely achieve its supposed purpose. Because a classification subject to strict judicial scrutiny fails to satisfy that test if it is "insufficiently 'tailored' to achieve the articulated state goal," *Dunn* v. *Blumstein, supra,* 405 U.S. at 357, the court below correctly determined that NYEL § 661(3) is unconstitutional. Recalling this Court's admonition of more than twenty years ago that "[s]uch an opportunity [public education], where the state has undertaken to provide it, is a right which must be made available to all on equal terms," *Brown* v. *Board of Education, supra,* 347 U.S. at 493, we urge affirmance of the holding below.

III. NYEL § 661(3) conflicts with the exclusive constitutional power of the federal government to regulate the conditions for the entrance and residence of aliens and imposes discriminatory burdens upon aliens in violation of 42 U.S.C. § 1981.

The power to regulate the immigration and naturalization of aliens is exclusively a federal power committed to the political branches of the federal government. *DeCanas* v. *Bica,* 424 U.S. 351, 354 (1976); *Examining Board* v. *de Otero, supra,* 96 S. Ct. at 2281; *Mathews* v. *Diaz, supra,* 424 U.S. at 81; U.S. Const. Art. I, § 8, cl. 4. A state statute which conflicts with the federal program for the regulation of resident aliens may not stand because it constitutes "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Hines v. *Davidowitz,* 312 U.S. 52, 67 (1941); *DeCanas* v. *Bica, supra,* 424 U.S. at 363.

The States

> "can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states. State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration. . . ." *Takahashi* v. *Fish & Game Comm'n, supra,* 334 U.S. at 419.

Accord, DeCanas v. *Bica, supra,* 424 U.S. at 358 n.6. Accordingly, a state statute which imposes "auxiliary burdens upon the entrance or residence of aliens . . . discourages entry into or continued residency in the State." *Graham* v. *Richardson, supra,* 403 U.S. at 378-79, and conflicts with the supreme federal power in the immigration area.

Congress has in fact enacted a comprehensive plan for the regulation of aliens residing in the United States, and has broadly guaranteed aliens "the same right in every State and Territory . . . to the full and equal benefit of all laws . . . for the security of persons and property as is enjoyed by white citizens." 42 U.S.C. § 1981. As a consequence of this statutory declaration "[a]liens lawfully within this country have a right to enter and abide in any State in the Union 'on an equality of legal privileges with all citizens under non-discriminatory laws.'" *Graham* v. *Richardson, supra,* 403 U.S. at 377, *quoting from Takahashi* v. *Fish & Game Comm'n, supra,* 334 U.S. at 420.

On the basis of this congressionally declared policy of equality of legal privilege, the Court has struck down state statutes which discriminated against aliens in the enjoyment of public resources, the receipt of public bene-

fits and in the opportunity to work. *See* ***Takahashi*** v. ***Fish & Game Comm'n, supra; Graham*** v. ***Richardson,*** *supra; C.D.R. Enterprises* v. ***Board of Education, supra.***[20]

The same conclusion should obtain here. Education is vital and necessary in order to secure a job and advance economically. *See* discussion *supra* at pp. 15-16 and *infra* at pp. 31-32. The right to engage in a chosen profession, guaranteed the alien by the Court's decisions in *In re Griffiths, supra,* and *Examining Board* v. *de Otero, supra,* is meaningless if the alien is unable to obtain the necessary training. The fact that education has not been held to be a "fundamental right" is not determinative because a state can violate federal policy by simply denying aliens a "privilege" offered to its citizen residents. *Graham* v. *Richardson, supra.*

Nor is it sufficient to state that the permanent resident alien is not completely barred from attending New York's institutions of higher education. (Appellants' Brief at 21.) Complete foreclosure of an area is not necessary before a determination can be made that a state law "burdens" an alien's residence in this country. In *Truax* v. *Raich,* 239 U.S. 33 (1917), the Court struck down as violative of federal immigration policy an Arizona law which required all Arizona employers of more than five workers to hire at least 80% qualified electors or native-born citizens of the United States. Of course, the state had not foreclosed *all* employment to aliens. Up to 20% of the work force of these employers could constitute aliens, and presumably aliens were free to work without any numerical limitations in jobs requiring five or less employees.

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[20] *See also, Mohamed* v. *Parks,* 352 F. Supp. 518, 521 (D. Mass. 1973); *Sugarman* v. *Dougall,* 339 F. Supp. 906, 910-11 (S.D.N.Y. 1971) (three-judge court), *aff'd on other grounds,* 413 U.S. 634 (1973); *Younus* v. *Shabat,* 336 F. Supp. 1137, 1140 (N.D. Ill. 1971); *Purdy & Fitzpatrick* v. *California,* 71 Cal.2d 556, 79 Cal. Rptr. 77, 456 P.2d 645 (1969).

The consequences of being deprived the opportunity of pursuing higher education are real and burdensome. It is beyond peradventure that lack of financial assistance may effectively preclude attendance in college. This is so even in the absence of a tuition charge.[21]

Indeed, the entire enactment of New York's financial aid program is the result of the recognition that a lack of funds can effectively bar an otherwise qualified student from attending college. (*See* discussion *supra* at pp. 19-21.) The less education and training a worker receives, "the less chance he has for a steady job." *Occupational Outlook Handbook,* U.S. Dept. of Labor, p. 19 (1976-77). The unemployment rate of persons who have completed only four years of high school is double that of college graduates. *Id.* Additionally, "[a]ccording to the most recent data, men who had college degrees could expect to earn about . . . two and three-quarters times the [amount] likely to be earned by workers who had less than 8 years of schooling, nearly twice the amount earned by workers

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[21] The question is largely academic for our purposes because there is no longer any opportunity to receive a "tuition-free" college education in New York State. The "free tuition" policy of the City University of New York (CUNY) ended in the summer of 1976. The tuition rate for full time students at Brooklyn College is $775 per year for freshmen and sophomores and $925 per year for juniors and seniors. Part time students pay $35 and $40 per credit in their respective categories. *Brooklyn College Bulletin* (1976-77).

The standard tuition fee for state residents attending college in the State University of New York system (SUNY) is $750 per year for freshmen and sophomores and $900 per year for juniors and seniors. Out-of-state residents pay $1200 and $1500 per year in the respective categories. *Undergraduate Bulletin,* State University at Albany Catalogue, p. 15 (1976-77).

The drop in full-time enrollment in both the senior and community colleges of CUNY after the imposition of tuition was eleven per cent, approximately 14,000 students. The drop in part-time enrollment was thirty per cent, approximately 27,000 students. DATA BOOK, City University of New York, Table III (1976-77) (forthcoming).

who had 1 to 3 years of high school and more than 1½ times as much as high school graduates." *Id.*

The effect of NYEL § 661(3) is to impose an obstacle in the path of the permanent resident alien seeking higher education and economic security. It constitutes a burden in an important and vital area crucial to his development and survival as a person. As such, it must be regarded as tending to discourage entrance and residence in New York State and conflicting with the federal grant of resident alien status to appellee. It also contravenes the federal policy expressed in 42 U.S.C. § 1981 of "equality of privileges" under state laws for all resident aliens.

New York's asserted concern for the resident alien's lack of allegiance and its contention that it may disfavor those residents of the state who have "chosen to retain [their] primary allegiance to the country of [their] nationality" (Brief at 19), clearly demonstrates the extent to which NYEL § 661(3) intrudes into forbidden territory. When a state enacts laws which distinguish between citizens and resident aliens unwilling to become citizens on the ground of the greater allegiance to the United States of the former group, it acts in a manner clearly inconsistent with federal law regulating the entrance and residence of aliens. *See Younus* v. *Shabat, supra.*

The Immigration and Nationality Act already makes suitable provision for excluding those persons of questionable allegiance to the United States. The provisions of 8 U.S.C. §§ 1182(a)(27), (28), (29), coupled with the questioning of entrants into this country by federal authorities,[22]

[22] All aliens arriving at ports of the United States are examined by immigration officers. The Attorney General and any immigration officer has the power to question entrants to the United States and

> "Any person coming into the United States may be required to state under oath the purpose or purposes for which he comes, the length of time he intends to remain in the United

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indicate that the federal government considers the intent of an alien to become a citizen, as well as his allegience, in allowing him entry. The term "lawfully admitted for permanent residence" means "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws. . . ." 8 U.S.C. § 1101(20). *Compare* 8 U.S.C. § 1101(15)(F).

If the federal government has allowed certain aliens admittance to this country as permanent resident aliens, without requiring them to declare their intention to become citizens as a condition of admission, then there is a clear federal policy that such aliens may live in each state on an equality of privilege with other state citizens without having to renounce their allegience to a foreign government or declare their intent to become citizens. A state statute which in effect conditions benefits on factors the federal government has already considered in allowing these aliens entrance into the country is a "state regulation not congressionally sanctioned that discriminates against aliens lawfully admitted to the country" and impermissibly imposes "additional burdens not contemplated by Congress." *DeCanas* v. *Bica, supra,* 424 U.S. at 358 n.6.

The conclusion that the statute intrudes into the area of federal immigation policy is further buttressed by that part of the statute which makes eligible for assistance those aliens who are within "a class of refugees paroled by the attorney general of the United States under his parole authority. . . ."[23] NYEL § 661(3)(d).

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> States, whether or not he intends to remain in the United States permanently and, if an alien, *whether or not he intends to become a citizen.* . . ." 8 U.S.C. § 1225(a) (emphasis supplied).

[23] The Attorney General exercises his parole power pursuant to 8 U.S.C. § 1182(d)(5). The award or refusal of parole, its condi-

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In recent years he has exercised such authority on behalf of refugees who were "Czechoslovakians, Ugandans, Cubans temporarily sojourning in Spain and other countries, Vietnamese and Cambodians, and Jews from the Soviet Union." Gordon & Rosenfeld, 1 IMMIGRATION LAW AND PROCEDURE § 2.54 at 147 (1976 Supp.) Indeed, the legislative materials included in the official Bill Jacket to L. 1975, c. 663 maintained by the New York State Library in Albany indicate that NYEL § 661 (3)(d) was added in response to the plight of Soviet Jews paroled into the United States and residing in New York. *See* Letter of State Senator Carol Bellamy to Governor Carey, July 29, 1975.[24]

When New York amended NYEL § 661(3) in 1975 so as to grant paroled refugees the same benefits available to citizens, it was acknowledging that its previous exclusion of these persons was in clear conflict with the federal policy of admitting substantial numbers of such persons into the United States. If the state did not discriminate against aliens generally, the conflict with federal policy would not have existed and the 1975 amendment to the statute would not have been required to eliminate the burden that NYEL § 661(3) imposed on substantial numbers of Soviet Jewish refugees residing in New York.

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tions and its termination are in his discretion. Parole does not grant any legal residence status. "[I]t allows temporary harborage in this country for humane consideration or for reasons rooted in public interest." Gorden & Rosenfeld, 1 IMMIGRATION LAW & PROCEDURE § 2.54 at pp. 2-248-249 (1976).

[24] The Immigration and Naturalization Service was unable to provide counsel with any total figure on the number of parole refugees admitted under the Attorney General's discretion. We were informed, however, that between 1973-1976, 144,000 Indochinese, 2,550 Soviet Jews and 1,500 Ugandans were admitted under this power. On January 13, 1977, former Attorney General Levi announced that he had approved the parole into the United States of 4,000 more Soviet Jews currently residing in Rome. U.S. Dep't of Justice press release dated 1/13/77.

It is for the political branches of the federal government to classify aliens and decide the ramifications of such classification. "[D]ecisions in these matters may implicate our relations with foreign powers and a wide variety of classifications must be defined in the light of changing political and economic circumstances." *Mathews* v. *Diaz, supra,* 426 U.S. at 81. If every state were left free to decide which class of aliens it should benefit or burden, the interference with the comprehensive scheme of regulation enacted by Congress and our relations with foreign governments would be substantial.[25]

Finally, we submit that in the area of student loans assisted or funded by the feredal government, the New York citizenship restriction conflicts with a specific federal regulation. As a participant in the Federal Guaranteed Student Loan Program (*see* 20 U.S.C. §§ 1071-1087-2), New York must conform its student loan programs to federal standards. Those standards qualify for assistance all students, whether citizens or others "in the United States for other than a temporary purpose . . . [who] inten[d] to become a permanent resident thereof. . . ." 45 C.F.R. § 177.2(a) (1976). In this regard also New York is acting contrary to federal policy and is burdening those whom the federal government in the exercise of its exclusive authority over the status of aliens has mandated should receive equal treatment.

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[25] One can easily imagine that various Middle Eastern governments might be perturbed by New York State's policy of favoring Jewish refugees over resident aliens of other countries.

CONCLUSION

For the foregoing reasons, the judgment of the three-judge district court should be affirmed insofar as it declared NYEL § 661(3) unconstitutional.

January 28, 1977

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* The assistance of Jay R. Fialkoff and Karen E. Wagner, two recent law school graduates awaiting admission to the New York Bar, in the preparation of this brief is hereby acknowledged.

In The

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-208

EWALD B. NYQUIST, Commissioner of Education of the State of New York, et al.,

Appellants,

against

JEAN-MARIE MAUCLET,

Appellee.

EWALD B. NYQUIST, Commissioner of Education of the State of New York, et al.,

Appellants,

against

ALAN RABINOVITCH,

Appellee.

On Appeal from the United States District Courts for the Western and Eastern Districts of New York

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TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

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BRIEF FOR APPELLEE MAUCLET

Statement of the Case

Jean-Marie Mauclet is an immigrant to the United States. His ties to the United States are substantial: he is married to a United States citizen; he is the father of a United States citizen; at the time New York denied him assistance he had been a permanent resident of the United States for more than five years (A. 8, 49, 97).

Between 1974-76 Mauclet was a graduate student at the State University of New York at Buffalo. He applied for a tuition award for 1974-75 to assist in paying the annual $1200 tuition charge for his program (A. 50). He satisfied all the criteria for an award except citizenship; he had, for example, been a resident of New York all the time he had been a permanent resident of the United States (A. 8, 49, 50, 97). On the basis of his need, as defined by the state, he was entitled to the maximum annual award of $600 for graduate students (A. 50).[1] He was denied assistance because he had not petitioned for citizenship, and would not do so at that moment. His affidavit states:

> Although I am presently qualified to apply for citizenship and intend to reside permanently in the United States, I do not wish to relinquish my French citizenship at this time (A. 50).

Mauclet's claim is limited to the rights of immigrants.[2] Appellants argue that Education Law §661 (3) does not distinguish between immigrant and nonimmigrant students. Brief, p. 20 n. 1. However, nonimmigrants are barred by the statute's residency rule which requires one academic or calendar year of legal residence. N.Y. Educ. Law §661 (5) (a, b) (McKinney Supp. 1976-77). Appellants' instructions to students specifically state that only citizens or immigrants, not visiting students, may be legal residents (A. 94). This accords with the Immigration and Naturalization Act which limits the

[1]This fact is asserted in Mauclet's affidavit in support of his motion for summary judgment. Appellants answered neither Mauclet's complaint nor his affidavit.

[2]Throughout the brief the term immigrant will be used interchangeably with permanent resident or resident alien. The Immigration and Naturalization Act provides that "the term 'lawfully admitted for permanent residence' means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant. . . ." 8 U.S.C. §1101 (a) (20) (1970).

issuance of a student visa to "an alien having a residence in a foreign country which he has no intention of abandoning. . . ." 8 U.S.C. §§1101 (a) (15) (F), 1201 (a) (1970); 22 C.F.R. §41.45 (1975).

Second, his claim relates to the denial of tuition assistance. The tuition assistance program has several distinguishing features. It is intended to be a universal program. State residence, admission to an approved program, a demonstrated ability to complete a degree and a tuition obligation exceeding $200 are the only eligibility requirements, except for those imposed by the citizenship rule. No award may be made without need, and no award may exceed tuition and mandatory fees. The program is premised on the state's conclusion that assistance is necessary if higher education is to be enjoyed by all residents of the state who have the interest and ability to secure admission to an approved program of postsecondary education. The only residents denied this assistance are immigrants who are not ready to petition for naturalization at the time required by the state.

New York's Financial Assistance Program

1865-1961

The oldest of New York's present scholarship programs was established by the legislation incorporating Cornell University as the state's land grant college. 1865 N.Y. Laws ch. 585. The state appropriated to Cornell the proceeds of public land sales, and in return imposed obligations on the university. One was that it be open to students "without distinction as to rank, class, previous occupation or locality"; another was that it equalize opportunities through the state by accepting and not charging tuition to one student from each assembly district who succeeds in a competition. *Id.*, §9. There was no citizenship requirement, and none was added until 80 years later. 1945 N.Y. Laws ch. 510, §1 subd. 2. The direct descendant of the 1865 Act is the regents scholarship in Cornell University. N.Y. Educ. Law §605 (6) (McKinney Supp. 1976-77).

The regents college scholarship program followed. 1913 N.Y. Laws ch. 292, §1. It began as a modest program; 750 annual awards of $100 were distributed through the state. The awards were made in each county in accordance with academic achievement. Students were required to be residents of the county in which they competed for a scholarship. There was no citizenship requirement, and it was not until 1920 that the legislature enacted one. 1920 N.Y. Laws ch. 502.

Immediately after World War I, the legislature created a limited number of scholarships for honorably discharged soldiers, sailors, and marines. 1919 N.Y. Laws ch. 606. Recipients were required to be residents of New York State, but not citizens. This program was expanded in 1944 to cover veterans of World War II. Again, residence but not citizenship was required. 1944 N.Y. Laws ch. 418.

In 1936, the legislature created another special scholarship, this time for children of soldiers, sailors, and marines who died while serving in the armed forces of the United States, or as the result of service injuries. New York residence, but not citizenship, was required. 1936 N.Y. Laws ch. 834, §2. Subsequent enactments authorized awards to children who had a veteran parent who was a citizen and resident of New York at the time of his death, 1940 N.Y. Laws ch. 511, and children of other honorably discharged veterans, 1944 N.Y. Laws ch. 295. None of these enactments required that children recipients be citizens.

Beginning in 1949, the legislature created a number of scholarships for professional education in selected fields: medicine and dentistry, 1949 N.Y. Laws ch. 819; basic nursing, 1955 N.Y. Laws ch. 339, §14; engineering and science, 1956 N.Y. Laws ch. 798; and advanced nursing, 1956 N.Y. Laws ch. 890. All of these programs required legal residence in New York State; none required citizenship.

Each of these scholarship programs exists at present with modifications. None was created with a requirement that recipients be citizens, although two — the regents college scholarship and the Cornell scholarship — were amended to include one. The programs were limited in scope. At the time of the 1961 revision of state student aid programs, the number of annual scholarships, with the exception of those for veterans and engineers, was limited to 5% of the total number of students who graduated the preceding year from high schools in the state. 1957 N.Y. Laws ch. 756, §1, adding N.Y. Educ. Law §601 (2).

The 1961 Amendments

The tuition assistance program originated in 1961 in a comprehensive revision of state student assistance laws. Early in the legislative session Governor Rockefeller presented a special message proposing a major increase in financial assistance to students through a scholar incentive program for tuition expenses, and an expansion of the state's regents scholarship program. 1961 N.Y. Legis. Annual 366. The Governor's address referred to a need to educate the nation's citizens but additionally identified the progress of the state with "educational opportunity for all who have the desire and the capacity to make use of it." *Ibid.* The scholar incentive program was offered as a way to assist everyone who had been admitted to an institution of higher learning by providing "each full-time, tuition paying student attending an undergraduate college in the State, who is also a resident of the State . . . with an annual grant. . . ." *Id.* at 368. The same would be true for "each" tuition paying resident graduate student. *Ibid.* The Governor also proposed an expansion of the regents college scholarship program, which he described "as an encouragement to scholastic achievement and as a means of assuring educational opportunities for the specially talented. . . ." *Id.* at 369.

The legislature doubled the number of regents scholarships and created the scholar incentive program. 1961 N.Y. Laws ch. 389. In addition to the findings which appellants cite, the legislature declared that an enlarged program was necessary "not only for the specially talented, but for *all* who have the ability and ambition to achieve [higher education]. . . ." *Id.*, §1(e) (emphasis added).

The incentive program was created as an entitlement program. To be eligible a person needed to be a resident of New York State for an academic or calendar year and be admitted to an approved program of higher education. 1961 N.Y. Laws ch. 391, §4, adding Educ. Law §601-a (2). The statute also required that recipients evidence promise of successfully completing their degree requirements. *Ibid.* The program provided a maximum award for undergraduates of $300 a year, and a minimum of $100, depending on need. *Id.*, §601-a (4). The awards for graduates ranged between $200 and $800, again depending on need. *Id.*, §601-a (7). There was no requirement that recipients be citizens. The Board of Regents was not authorized to enact a citizenship requirement by rule.

By a separate act the legislature amended the sections of the Education Law governing five of its existing scholarship programs. Two of these scholarships already had citizenship requirements: the regents college scholarship and regents Cornell scholarship. The existing requirement was deleted, and a provision substituted requiring that recipients "meet the citizenship requirements prescribed by regents' rule." 1961 N.Y. Laws ch. 391, §§2, 18, amending N.Y. Educ. Law §§604, 5710 (McKinney 1969). Three other programs — medicine and dentistry, basic professional education in nursing, and advanced study in professional nursing — contained no citizenship requirement. They were all amended to require that recipients also "meet the citizenship requirements prescribed by regents' rule." *Id.*, §§7, 14, 19, amending N.Y. Educ. Law §§610, 611, 613 (McKinney 1969).

The State Education Department described the provisions of chapter 391 in a memorandum to the Governor. 1961 N.Y. Legis. Annual 130. The portion applicable to the citizenship requirement is reproduced here in full:

> This bill provides technical amendments to the various provisions of the Education Law in relation to scholarships which have been found by the Department to be desirable in the orderly administration of the scholarship program and in the interests of being fair to the participants therein.
>
> The bill initially provides for a uniform citizenship requirement which can be provided by a Regents rule. Under the current statute a person may be eligible for one scholarship and ineligible for another.

The only reasons, accordingly, for the citizenship provisions in chapter 391 were "orderly administration" and "fairness" to applicants. There is no indication of any interest in citizenship education or recruitment.

The legislature, then, distinguished between its two aid programs. One, the scholar incentive, was intended to benefit all college and university students in the state. All that would be required was admission to an institution of higher learning and state residence, but not citizenship. Five limited scholarship programs would be governed by a uniform citizenship rule prescribed by the regents.

The regents enacted a citizenship requirement for its scholarship programs. 8 N.Y.C.R.R. §145.4 (March 29, 1962). This rule was modified several times prior to its repeal in July 1969; at no time did it include scholar incentive awards. Between 1961 and 1969 citizen and immigrant were eligible on equal terms for tuition assistance.

The 1969 Amendments

The present citizenship requirement was enacted in 1969 and amended in 1975 to exempt paroled refugees. 1969 N.Y. Laws ch. 1154, adding N.Y. Educ. Law §602(2); amended 1975 N.Y. Laws ch. 663; presently N.Y. Educ. Law §661(3) (McKinney Supp. 1976-77).

On February 14, 1969, State Senator Dominick introduced S.4606 at the request of the Joint Legislative Committee to Revise and Simplify the Education Law ("Joint Legislative Committee"). The bill was reported to the Committee on Higher Education. The bill was also introduced in the Assembly as A.6491.

The bill is analyzed in Higher Education Staff Report No. 8, dated February 21, 1969.[3] The report indicates that the bill would economize in three ways. First, $8,000,000 would be saved by eliminating the minimum scholar incentive award to students whose parental net taxable income exceeded $10,000. The scholar incentive program, as originally enacted, provided for annual payment of $100 to every student no matter how great his parents' income. Second, an estimated $10,000 would be saved by making citizenship a requirement for tuition assistance. Third, there would be a reduction in awards after the first year of graduate study. On the expenditure side, the bill

[3]Staff Report No. 8 is reprinted in the appendix of this brief at B-2. It is on file in the New York State Library in two places: the Governor's Veto Jacket for S.5676-A, a vetoed amendment to ch. 1154, and a separate file of memoranda of the Joint Legislative Committee. It is referred to in a published memorandum of the Joint Legislative Committee, 1969 N.Y. Legis. Annual 214, and in Higher Education Staff Report No. 9, cited by appellants at page 15 of their brief. The published memorandum is reprinted in the appendix to this brief at B-13 to reflect several handwritten insertions and a statistical table not printed in the Legislative Annual. Higher Education Staff Report No. 9 is filed in the New York State Library in the bill jacket for 1969 N.Y. Laws ch. 1154 and is reprinted in the appendix to this brief at page B-16.

proposed, *inter alia*, an increase in the support of lower income undergraduate students, the award of five-year regents scholarships for certain programs, additional nursing and war veteran scholarships, and an eligibility standard for scholar incentive applicants based solely on admission to an approved program and not on any other academic standard established by the regents. The initial projection for net savings was $3,505,000 (B-4).

Every proposed change except one was justified by a stated policy objective. For example, the elimination of minimum awards for persons whose family incomes exceeded $10,000 would permit greater assistance to more needy students (B-5); the abolition of academic and test criteria for first-year scholar incentive applicants would assist disadvantaged youths (B-7); additional nursing scholarships would meet needs for trained nurses (B-9, 10).

The exception was the citizenship requirement for the scholar incentive program. The full explanation provided by the staff report was:

> *Comment:* Citizenship is presently required to be eligible for all award programs except scholar incentive. It is proposed that citizenship be made a uniform requirement. About fifty students would be affected by this change.
>
> *Budgetary Implication:* The estimated savings is $10,000 (B-8).

There is no indication that any objective would be served other than the saving of this sum.[4]

[4]There is also no indication of how the staff decided that fifty students would be affected by the change. It is likely that the number reflects a judgment that the actual number of people excluded would be small. There is no information in the record which shows the number of permanent residents

Footnote continued on next page

The following day the committee issued a memorandum superseding Staff Report No. 8 in several respects. Principally, the memorandum reflects a decision to retain the $100 minimum award for all undergraduates enrolled at that time; only new students would not receive the minimum award if their attributable incomes exceeded $10,000 (B-13). A new chart showing reduced fiscal year 1969-70 savings was prepared. It omitted any projection for savings from the imposition of a citizenship requirement (B-15).

The bill was amended further to provide minimum awards for persons with incomes up to $20,000, and renumbered S.4606-B. The final bill is described in Higher Education Staff Report No. 9, the document appellants cite for the history of the citizenship requirement. All that Staff Report No. 9 says about citizenship is:

> Other revisions contained in this proposal are described in this Committee's Staff Report No. 8. These provide for . . . (8) U.S. citizenship requirement for scholar incentive assistance (conforming to state scholarship provisions) (B-18).

Footnote continued from preceding page

attending approved programs of postsecondary education in New York. The one available statistic indicates that the number is small in relation to total enrollment. In fall 1972 there were 231,965 full-time students enrolled in the State University of New York; 226,800 were citizens; 5,165 were not. Only 847 non-citizens were permanent residents; the remainder were on temporary visas. Accordingly, permanent residents comprised only 0.3% of the total enrollment in the State University. Central Staff of Institutional Research, State University of New York, *Full-Time Credit Course Enrollment of Students at Institutions of the State University of New York by Citizenship Status and Visa Type, Fall 1972* (Jan. 19, 1977). This report, which is on file in the Office of Institutional Research, was compiled at our request. It is based on the data gathered by that office and reported in Office of Institutional Research, State University of New York, *Geographic Origins of Students, Fall 1972, Report No. 42*, p. 4, table 2.

The increase in the maximum income limit for minimum awards reduced the net fiscal year savings to $2,200,000 (B-18). The committee's table of savings again omitted any reference to the earlier projection that a citizenship requirement would save $10,000 (B-19).

The legislature then enacted a chapter amendment to S.4606-B to make the $20,000 maximum for minimum awards applicable immediately. The Joint Legislative Committee estimated that the amendment, S.5676-A, would produce a $900,000 saving for 1969-70 (B-20). Both bills were sent to the Governor. The State Education Department recommended approval of both. The Bureau of the Budget recommended approval of S.4606-B on several grounds: savings from the elimination of minimum awards for persons with incomes exceeding $20,000 would make money available to assist needy students; there would be a net fiscal saving of $2,200,000; there would be no need to reduce individual grants across the board by 5% to achieve an expenditure reduction required by the state's supplemental budget that year (B-21). The Bureau of the Budget indicated that public reaction could be expected on behalf of new undergraduates (with incomes over $20,000) who would not be eligible for a minimum award (B-24). There is no reference in the budget report to the citizenship requirement. No objective is stated, no budget implication noted, and no adverse public reaction anticipated.

The Governor vetoed S.5676-A as "unnecessary," 1969 N.Y. Legis. Annual 614, and approved S.4606-B, which became 1969 N.Y. Laws ch. 1154. His memorandum of approval states "the bill will do much within the limitation of available funds to further New York State's goal that no young man or woman with the capacity and the desire to seek a college education should be prevented from doing so for lack of financial resources." 1969 N.Y. Legis. Annual 588. However, the memorandum makes no attempt to reconcile this goal with a

requirement that would deny assistance to immigrants who were not prepared to petition for citizenship when required to do so by the state.[5]

SUMMARY OF ARGUMENT

The Education Law classifies New York residents on the basis of their citizenship or alienage. This requires the Court to examine with care the state's objectives and the means it chooses to achieve them. Neither the actual nor purported objective of the first citizenship requirement in 1920 is known. The extension of the requirement in 1961 was predicated on an interest in uniformity and orderly administration. The further extension of this requirement in 1969 to the tuition assistance program was based on a budget estimate that $10,000 could be saved by the requirement. The economic character of this discrimination is demonstrated by the state's history during the last 100 years of excluding aliens from professions and occupations. None of the actual objectives justifies the disadvantage under which aliens are placed.

The state claims that its true objectives are to encourage immigrants to become citizens and to educate citizen leaders. There are no state interests served by recruiting citizens. The state will neither gain representatives in Congress nor additional federal funds if it induces immigrants to become citizens. Although the state excludes immigrants who do not petition for naturalization as soon as possible, it provides assistance to citizens without any assurance that they will ever participate in New York's political community. The means the state has chosen to achieve its goals are neither necessary nor precise.

---

[5]The goal of educating every New York resident who demonstrates ability and interest in higher education continues to be repeated. Task Force on Financing Higher Education in New York State, *Higher Education in New York State, A Report to Governor Nelson A. Rockefeller* (1973). Governor's Memorandum Approving 1974 N.Y. Laws ch. 942, 1974 N.Y. Legis. Annual 409-10.

The citizenship requirement is also invalid under the supremacy clause. The objective of the Immigration and Naturalization Act is to foster family reunification and the immigration of persons with skills. The fulfillment of the full purposes and objectives of the Act requires that immigrants not be subjected to discrimination by the states. Immigrant relatives of citizens should be permitted to acquire education and skills and enter professions and occupations on equal terms with citizens for the benefit of the families which the Congress seeks to unify.

The Immigration and Naturalization Act requires a minimum period of residency before an immigrant may petition for naturalization but does not require that an immigrant petition within any period of time, or at all, and provides no inducements or penalties to encourage naturalization. The Act permits immigrants to resolve the important question of nationality without state imposed pressure. New York's attempt to induce immigrants to become citizens by threatening to deny them education assistance is inconsistent with the objectives of federal naturalization law.

I

The citizenship requirements of the New York Education Law deny to immigrants the equal protection of the laws.

The Education Law requires that an immigrant make a fundamental personal and political decision as a condition for receiving tuition assistance to which he is otherwise entitled. If he is eligible for naturalization, he must petition for it immediately. If he is not eligible, he must affirm his intent to apply for citizenship "as soon as he has the qualifications." N.Y. Educ. Law §661(3) (McKinney Supp. 1976-77). The decision to naturalize must be made on the state's timetable. Anyone who wishes additional time to decide does so at a price. Anyone who accepts the invitation of the United States to make this his permanent home but for a public or private reason chooses not to apply for citizenship will never receive tuition assistance.

A. *The Classification Created by the Education Law is Based on Alienage.*

Appellants argue that the statute differentiates classes of aliens and does not discriminate between citizens and immigrants. In their view, differentiation among aliens is supported by this Court's decision that Congress may limit the participation of aliens in federal medical insurance programs to permanent residents who have resided in the United States five or more years. *Mathews v. Diaz*, 426 U.S. 67 (1976). The Court, however, took care in *Mathews* to emphasize that it was an act of Congress, not that of a state, which was involved. *Id.* at 84. The power of the federal government to control the entrance and residence of aliens and the foreign policy implications of decisions concerning aliens "dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization." *Id.* at 82. States, however, may be prohibited from establishing the very classifications

which the federal government may utilize. *Id.* at 85. This Court's conclusion was explicit:

> [T]he Fourteenth Amendment's limits on state powers are substantially different from the constitutional provisions applicable to the federal power over immigration and naturalization. *Id.* at 86-7.[6]

The classification here is based on alienage. An immigrant may avoid its consequences only if he changes his class, or declares that he will do so in the shortest time possible. The district court rejected the state's argument, as follows:

> This argument defies logic. Those aliens who apply, or agree to apply when eligible, for citizenship are relinquishing their alien status. Because some aliens agree under the statute's coercion to change their status does not alter the fact that the classification is based solely on alienage (A. 99).

New York's exclusion of aliens who do not naturalize on the state's timetable makes this case indistinguishable from those in which classifications which disadvantage aliens are examined with care. *Graham v. Richardson*, 403 U.S. 365 (1971); *Sugarman v. Dougall*, 413 U.S. 634 (1973); *In re Griffiths*, 413 U.S. 717 (1973); *Examining Board v. Otero*, 96 S.Ct. 2264 (1976). It is not relevant that an immigrant might avoid a burden placed impermissibly on aliens by ceasing to be one. In both majority and dissent, this Court noted that the bar applicant in *Griffiths* was eligible to apply for citizenship but had no intention of doing so. 413 U.S. at 718 n.1, 650. Neither has it mattered that a state classification places some aliens together

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[6]Ironically, Medicare eligibility for immigrants begins where eligibility for tuition assistance may end. Congress decided that five years of permanent residence demonstrates the strength of an alien's ties. An immigrant is then eligible whether or not he petitions for naturalization. In New York, five years of permanent residence, the generally required period of residence prior to naturalization, ends an immigrant's eligibility unless he petitions for naturalization. As long as he does not petition he remains ineligible, no matter how long he resides in this country.

with citizens and apart from other aliens. In *Graham* citizens and aliens who had resided fifteen years in the United States were classified together; all other aliens were classified separately.

Accordingly, "the governmental interest claimed to justify the discrimination is to be carefully examined in order to determine whether that interest is legitimate and substantial, and inquiry must be made whether the means adopted to achieve the goal are necessary and precisely drawn." *Examining Board v. Otero*, 96 S.Ct. at 2282-83.

B. *The Actual Objective of the Citizenship Provision in Question has Nothing to do With Preserving or Strengthening New York's Political Community.*

The state argues that it is concerned with "survival" and that its objective is to strengthen its political community by educating citizen leaders and encouraging immigrants to become citizens. It is doubtful whether this is the actual basis for excluding immigrants who are not prepared to petition for naturalization at the time the state requires.

Appellants emphasize the legislative findings and declarations which introduce the act establishing the scholar incentive program. 1961 N.Y. Laws ch. 389, §1. This introductory matter refers, in one subdivision, to the state's interest in "the individual development of the maximum number of citizens. . . ." *Id.*, §1(a). The act created no citizenship requirement, however. These findings and declarations — another speaks of educating "all who have the ability and ambition" — were consistent with an enactment which required legal residence, but not citizenship.

Citizenship requirements have been an afterthought throughout the history of New York's financial assistance laws. Not one of the components of New York's present system was enacted, as an original matter, with a citizenship requirement. No history has been offered to indicate why a citizenship

requirement was added to the regents college scholarship program in 1920, or to the Cornell scholarship program in 1945, although it may be speculated that both requirements have war-time origins. Appellants note that the regents adopted a rule on July 19, 1917, requiring that scholarship recipients swear an oath of allegiance to the United States and the State of New York. Brief, p. 10 n. 2.

A little more is known about the 1961 enactment which called for a regents citizenship rule for three limited scholarship programs in addition to the regents college scholarship and Cornell scholarship programs. The objectives there were "uniformity," "orderly administration," and fairness among applicants. 1961 N.Y. Legis. Annual 130. There is no explanation, however, why the interests of uniformity, orderly administration, and fairness required the extension of the citizenship rule rather than its elimination.

The present citizenship requirement was proposed in 1969 to save $10,000 by "conforming" the scholar incentive program to the regents scholarship program. No other justification was offered. There is no hint in the legislative documents of any concern with citizenship education or recruitment. The Joint Legislative Committee, whose bill it was, its staff, the state budget office, and the Governor all focused their attention elsewhere as the legislature reworked assistance formulas involving thousands of students and millions of dollars. The savings anticipated from a citizenship requirement disappeared from the amended tables showing the fiscal consequences of the 1969 act. Nevertheless, the citizenship requirement was enacted. In the end, the only justification expressed was the first to be offered, the saving of a small sum of money at the expense of a small number of immigrants.

More may be known about the state's objectives by a review of the history of its laws concerning the status of citizens and aliens.

At first, this legislation concerned office holding, voting, jury service, military service, and real property. The first constitution of the state, adoped in 1777, gave the right to vote to resident male inhabitants, without any express limitation as to citizenship. There was a property requirement, however, that persons possess freeholds or rent tenements of stated values, and a requirement of an oath of allegiance to the state. Similarly, there was no stated citizenship requirement for office holders, although the governor and senators were required to be freeholders. N.Y. Const. of 1777, art. VII, VIII, X, XVII. The second constitution, ratified in 1822, specifically granted the right to vote to citizens and required that the governor be a native citizen. N.Y. Const. of 1822, art. II, §1, art. III, §2. Citizenship was made a requirement for all civil offices in the Revised Statutes of 1827-28, ch. V, title VI, art. 1, §1, which also reaffirmed the right of citizens to vote, *id.*, ch. VI, title I, §1, and to serve in the militia, *id.*, ch. X, title I, §1.

By 1825 it was clear that aliens were excluded from public office, voting, and jury service. In that year, the legislature granted aliens the rights enjoyed by citizens to hold, sell, assign, and devise real property, provided that the alien depose that he was a resident of the United States, intended always to be a resident, and intended to become a citizen as soon as he could be naturalized. 1825 N.Y. Laws ch. 307, §1. The legislature then specifically provided that alien land holders would be subject to military duty and all taxes owed by citizens, but would not be eligible to hold elected or appointed civil office, vote, or, as a general matter, serve on juries. *Id.*, §4.

New York, accordingly, acted during the first fifty years of independence to define its "political community." *Sugarman v. Dougall*, 413 U.S. at 647-49. It did so in terms of office holding, voting, and jury service, activities which are at the heart of representative government. Its conclusions were strikingly similar to those of the members of the First Congress who debated the first naturalization act. In their opinion, three state matters turned on the question of citizenship: eligibility for

office, the right to vote, and the right to own land. 1 Annals of Cong. 1147-64 (Gales & Seaton eds. 1790). Land holding aside,[7] the common perception of the First Congress and the State of New York, at an earlier time, was that a political community is defined by the rights to hold office, vote, and serve on juries, and that aliens may be excluded from these activities. As to economic opportunity, through land holding, the direction of New York law was to equality between citizen and alien.

The character of state legislation concerning aliens changed after the Civil War. First in 1871, and then with increasing frequency as the rate of immigration increased, New York enacted a succession of statutes requiring citizenship, or a declaration of intention to become a citizen, for no fewer than thirty-eight occupations and professions. Some have been legislatively repealed or modified, or invalidated by this Court; those not repealed or finally invalidated are italicized. By order of enactment, citizenship requirements have been imposed for attorneys,[8] *pawnbrokers*,[9] *grand jury stenographers*,[10] *plumbing inspectors*,[11] laborers on public employment

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[7]The land issue has its peculiar common law history. Exclusion of alien land holding originated in feudal times. There are now only a dozen states with substantial restrictions on alien land ownership. Morrison, *Limitations on Alien Investment in American Real Estate*, 60 Minn. L. Rev. 621 (1976).

[8]1871 N.Y. Laws ch. 486; implemented by Rules of the Court of Appeals, *id.*, p. 2195; currently, N.Y. Jud. Law §460 (McKinney 1968). The statute has no force following *In re Griffiths, supra*, but has not been repealed.

[9]1883 N.Y. Laws ch. 339; currently, N.Y. Gen. Bus. Law §41 (McKinney 1968).

[10]1885 N.Y. Laws ch. 348; currently, N.Y. Jud. Law §322 (McKinney Supp. 1976-77).

[11]1892 N.Y. Laws ch. 602; currently, N.Y. Gen. City Law §48 (McKinney 1968).

projects,[12] *traffickers in liquor,*[13] certified public accountants,[14] *blind adult vendors of goods and newspapers,*[15] *private investigators,*[16] *certified shorthand reporters,*[17] ship masters, pilots and engineers,[18] *bank directors and trustees,*[19] architects,[20] *state police officers,*[21] *teachers,*[22] *surveyors,*[23]

[12] 1894 N.Y. Laws ch. 622; currently, N.Y. Labor Law §222 (McKinney Supp. 1976-77). Ruled invalid *C.D.R. Enterprises v. Board of Education,* 412 F. Supp. 1164 (E.D.N.Y.), *aff'd,* 45 U.S.L.W. 3455 (U.S. 1977).

[13] 1896 N.Y. Laws ch. 112, §23; currently, Alco. Bev. Cont. Act §126 (3) (McKinney Supp. 1976-77).

[14] 1896 N.Y. Laws ch. 312; repealed 1971 N.Y. Laws 987, enacting N.Y. Educ. Law §7404 (6) (McKinney 1972).

[15] 1899 N.Y. Laws ch. 631; currently, N.Y. Gen. City Law §10 (McKinney 1968).

[16] 1909 N.Y. Laws ch. 529, §1, amending Gen. Bus. Law §71 (1); currently, N.Y. Gen. Bus. Law §72 (1) (McKinney Supp. 1976-77).

[17] 1911 N.Y. Laws ch. 587; currently, N.Y. Educ. Law §7504 (6) (McKinney 1972).

[18] 1913 N.Y. Laws ch. 765, §4; repealed 1962 N.Y. Laws ch. 672.

[19] 1914 N.Y. Laws ch. 369; currently, N.Y. Banking Law §§246 (3), 375 (6), 397 (2) (a) (McKinney Supp. 1976-77).

[20] 1915 N.Y. Laws ch. 454; repealed 1971 N.Y. Laws ch. 987, adding N.Y. Educ. Law §7304 (6) (McKinney 1972).

[21] 1917 N.Y. Laws ch. 161, adding Exec. Law §94; currently, N.Y. Exec. Law §215 (3) (McKinney Supp. 1976-77). The constitutionality of this statute was sustained in *Foley v. Connelie,* 419 F. Supp. 889 (S.D.N.Y.), *juris. statement filed.*

[22] 1918 N.Y. Laws ch. 158; currently, N.Y. Educ. Law §3001 (3) (McKinney 1970). The statute was invalidated in *Norwick v. Nyquist,* 417 F. Supp. 913 (S.D.N.Y.), *juris. statement filed.*

[23] 1920 N.Y. Laws ch. 775, adding Gen. Bus. Law §39-e (2); currently, N.Y. Educ. Law §7206-a (6) (McKinney 1972).

operators of billiard and pocket pool halls,[24] *medical doctors,*[25] *pharmacists,*[26] *real estate brokers,*[27] embalmers and undertakers,[28] *engineers,*[29] *dentists,*[30] *forest preserve guides,*[31] nurses,[32] competitive class of the civil service,[33] *racing track*

[24] 1922 N.Y. Laws ch. 671; currently, N.Y. Gen. Bus. Law §461 (McKinney Supp. 1976-77).

[25] 1923 N.Y. Laws ch. 496; currently, N.Y. Educ. Law §6524 (6) (McKinney 1972). Declared unconstitutional in *Surmeli v. State of New York,* 412 F. Supp. 394 (S.D.N.Y. 1976), *appeal pending.*

[26] 1924 N.Y. Laws ch. 338, §2; currently, N.Y. Educ. Law §6805 (6) (McKinney 1972).

[27] 1926 N.Y. Laws ch. 831; currently, N.Y. Real Prop. Law §440-a (McKinney 1968).

[28] 1929 N.Y. Laws ch. 370; deleted 1971 N.Y. Laws ch. 854 (McKinney Supp. 1976-77).

[29] 1931 N.Y. Laws ch. 678; currently, N.Y. Educ. Law §7206 (6) (McKinney 1972). Declared unconstitutional in *Kulkarni v. Nyquist,* 76-CV-344 (N.D.N.Y., Jan. 5, 1977).

[30] 1933 N.Y. Laws ch. 609, §3; currently, N.Y. Educ. Law §6604 (6) (McKinney 1972).

[31] 1938 N.Y. Laws ch. 40, adding Cons. Law §183; currently, N.Y. Env. Cons. Law §11-0533 (2) (McKinney 1973).

[32] 1938 N.Y. Laws ch. 472; repealed 1971 N.Y. Laws ch. 987, enacting N.Y. Educ. Law §6904 (6) (McKinney 1972).

[33] 1939 N.Y. Laws ch. 767; currently, N.Y. Civ. Serv. Law §53 (McKinney 1973). Invalidated, *Sugarman v. Dougall, supra.*

pari-mutuel employees,[34] *funeral directors,*[35] *veterinarians,*[36] psychologists,[37] *dental hygienists,*[38] employees of private institutions acquired by the state,[39] *landscape architects,*[40] *chiropractors,*[41] *masseurs and masseuses,*[42] *physical therapists,*[43] and *animal health technicians.*[44]

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[34] 1940 N.Y. Laws ch. 254; currently, N.Y. Unconsol. Laws §§7973, 8027 (McKinney 1961).

[35] 1944 N.Y. Laws ch. 647, adding Pub. Health Law §299-c; currently, N.Y. Pub. Health Law §3421 (2) (a) (McKinney Supp. 1976-77).

[36] 1956 N.Y. Laws ch. 176; currently, N.Y. Educ. Law §6704 (6) (McKinney 1972).

[37] 1956 N.Y. Laws ch. 737; repealed 1971 N.Y. Laws ch. 987, §2, enacting N.Y. Educ. Law §7603 (6) (McKinney 1972).

[38] 1957 N.Y. Laws ch. 553, currently N.Y. Educ. Law §6609 (6) (McKinney 1972).

[39] 1958 N.Y. Laws ch. 790; currently, N.Y. Civ. Serv. Law §45 (McKinney 1973). Undoubtedly invalid under *Sugarman v. Dougall, supra.*

[40] 1960 N.Y. Laws ch. 1082; currently N.Y. Educ. Law §7324 (6) (McKinney 1972).

[41] 1963 N.Y. Laws ch. 780; currently, N.Y. Educ. Law §6554 (6) (McKinney 1972).

[42] 1967 N.Y. Laws ch. 776; currently, N.Y. Educ. Law §7804 (6) (McKinney 1972).

[43] 1971 N.Y. Laws ch. 987; currently, N.Y. Educ. Law §6534 (6) (McKinney 1972). This statute has been declared unconstitutional in *Jackson v. Nyquist,* 76-CV-360 (N.D.N.Y., Jan 5, 1977).

[44] 1976 N.Y. Laws ch. 539, §7, adding N.Y. Educ. Law §6711 (6) (McKinney Supp. 1976-77).

There is little to unify this list other than a conclusion that when the state controls entry into an occupation, it frequently favors citizens.[45] It is a history of economic discrimination, and it sheds light on the state's objectives here. The imposition of a citizenship requirement on applicants for tuition assistance followed soon after the imposition of a requirement on masseurs and immediately preceded the imposition of one on physical therapists. The economic character of this discrimination is underscored by the legislative history of the 1969 act. The citizenship requirement was predicated on a relatively insignificant saving at the expense of a small number of immigrants. There is no evidence that anyone, prior to this action, viewed the citizenship requirement as a way to strengthen New York's political community.

C. *The Actual Objectives of the State — Uniformity, Orderly Administration, and a Slight Reduction in Program Costs — Do Not Justify New York's Citizenship Requirement.*

The state makes no attempt to justify its citizenship requirement on the basis of its actual objectives. Indeed, it could not. Uniformity and administrative orderliness may be achieved just as well by no citizenship requirement, and fiscal justifications for state discrimination are firmly rejected by this Court. *Graham v. Richardson,* 403 U.S. at 376; *Sugarman v. Dougall,* 413 U.S. at 645-46; *Hampton v. Mow Sun Wong,* 426 U.S. 88, 96 (1976). The fiscal argument is a species of the

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[45] The state legislature enacted a bill in 1955 requiring citizenship or a declaration of intention in order to practice veterinary medicine. The State Department of Education's memorandum to the Governor, recommending approval, noted that practically all state laws regulating professions required citizenship. The memorandum stated no other reason for applying a citizenship requirement to the practice of veterinary medicine, other than that licensing "is one of the emoluments which attach to persons who support our form of government." 1955 N.Y. Legis. Annual 160.

discredited special-public-interest doctrine which at one time permitted states to limit resources to citizens. Immigrants contribute to the resources of the nation and the states in which they live; there is no basis to exclude them from the use of these resources. *Sugarman v. Dougall,* 413 U.S. at 645.

The state does not defend its actual objectives. The question remains whether its claimed objectives justify the statute.

D. *Neither the State's Claimed Objectives nor the Means the State has Selected to Achieve Them Justify the Discrimination Imposed.*

The state contends that its "preservation" and "survival" are at stake. It is difficult to fathom how the education of an immigrant might threaten the State of New York. The legislature is concerned about the need for educating large numbers of people so that the state might survive and prosper. But it is not the ultimate objective of the total program which needs to be examined. Rather, it is "the governmental interest claimed to justify the discrimination" which must be scrutinized. *Examining Board v. Otero,* 96 S.Ct. at 2282.

1. *Citizen Recruitment is not a Substantial State Interest, and May not be an Appropriate One.*

The state asserts an interest in increasing the number of its citizens by providing immigrants with a financial inducement to petition for naturalization. There is no benefit which the State of New York may receive from the conversion to citizenship of immigrants residing in New York. No state stands to gain any representatives in Congress by the naturalization of immigrants. Representatives are apportioned according to "the whole number of persons in each State." U.S. Const. amend. XIV, §2. Immigrants are persons for the purpose of the equal protection clause of the fourteenth amendment. *Yick Wo v. Hopkins,* 118 U.S. 356 (1886). They are persons for the apportionment clause

of the same amendment. Indeed, they are enumerated as residents by the Bureau of Census, on whose population statistics apportionment is based. H.R. Rep. No. 91-1314, 91st Cong., 2nd Sess. 5 (1970). All citizens of foreign countries who are studying or working in the United States are enumerated; only persons temporarily traveling or visiting in the United States or persons living on the premises of embassies or consulates are excluded. *Id.* at 24. In addition to apportionment, the census of resident population is the basis for distributing significant amounts of federal assistance to the states. *E.g.,* State and Local Fiscal Assistance Act of 1972, Pub. L. No. 92-512, §109(a) (1), 86 Stat. 919; Housing and Community Development Act of 1974, Pub. L. No. 93-383, §102(a) (7), 88 Stat. 633. A state may have an interest in the number of its residents, but not whether they are citizens or immigrants.

Additionally, it is the responsibility of the national government rather than the states to decide whether aliens should be given financial incentives to become citizens. Immigrants become citizens by virtue of federal, not state, law. Even within the federal government, only the Congress or the President, in his sphere, may decide whether incentives should be provided. *Hampton v. Mow Sun Wong,* 426 U.S. at 104-5. The federal government funds and administers a large student assistance program and does not use the possible denial of assistance as a means to induce immigrants to become citizens. All federal student assistance programs are available to citizens and permanent residents on equal terms.[46] The fact that the national

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[46] In 1958 Congress enacted the National Defense Education Program to provide loans and fellowships to students. 20 U.S.C. §§401-589 (1970). There is no citizenship requirement, although an oath of allegiance is mandated. Non-citizens may take this oath in good faith. *In re Griffiths,* 413 U.S. at 726 n.18. Also, the regulations of the Office of Education provide that a student is eligible if he is either a national of the United States, *or* "is in the United States for other than a temporary purpose and

Footnote continued on next page

government, with its pre-eminent interest in citizenship, does not use educational assistance as an inducement to aliens to naturalize suggests that neither the Congress nor the Executive Branch consider the possible denial of assistance to be a necessary or appropriate means of persuading immigrants to naturalize.

The state neither has anything practical to gain nor a proper role to perform in using financial pressure to encourage immigrants to petition for naturalization. Its "concern for attracting new citizens," appellants' brief, p. 23, does not justify the denial of assistance to immigrants who do not wish to naturalize or, as Mauclet, have simply not yet decided.

Footnote continued from preceding page

intends to become a permanent resident thereof." 45 C.F.R. §144.7 (a) (1) (1976). A similar provision makes immigrants eligible for the National Defense Fellowship Program. 45 C.F.R. §145.6 (d) (1976).

Then, starting with the Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219, and continuing with the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235, Congress enacted extensive loan and grant programs for students in institutions of higher learning. 20 U.S.C. §§1070-1087c (1970 & Supp. V 1975). These programs include a basic educational opportunity grant, an entitlement program similar to the New York tuition assistance program, 20 U.S.C. §1070a, supplemental grants, *id.*, §1070b, grants to states to establish student incentive grant programs, *id.*, §1070c, and loans, *id.*, §1071. There is no citizenship requirement in any of these statutes, and no oath of allegiance is required. Moreover, the regulations governing each of these programs all make immigrants eligible without any requirement that they seek citizenship. For example, the regulation governing the basic educational opportunity grant program provides:

> A student is eligible to receive a Basic Educational Opportunity Grant under this part if he . . . (3) Is a citizen or national of the United States or is in the United States for other than a temporary purpose and is, or intends to become, a permanent resident thereof, or is a permanent resident of the Trust Territory of the Pacific Islands.

45 C.F.R. §190.3(a) (3) (1976). See also *id.*, §176.9 (a) (1) (supplemental opportunity grants); *id.*, §177.2 (a) (4) (loans to students in institutions of higher learning); *id.*, §178.2 (4) (loans to vocational students); *id.*, §192.6 (state student incentive grant programs).

2. *Neither the State's Objective of Training Citizen Leaders, Nor the Means it has Chosen to do so, Justify the Citizenship Requirement.*

The state also asserts that its objective is to train "citizen leaders," *id.*, at 20, and "seek complete political participation from all who reside within its borders to the extent of their individual capacities." *Id.* at 22. As the state sees it, "the excluded alien eschews the very identification with the state and the United States which the programs seek to engender." *Id.* at 23. Thus, the state appears to argue, the objective of the statute is not fulfilled by educating immigrants who fail to apply for citizenship as soon as they are eligible to do so.

The state seriously misapprehends its own statute. The law has multiple goals. The education of citizen leaders may be one objective, but this goal exists side by side with the education of professional and technical manpower generally. The State Education Department estimates that 370,047 students will receive tuition assistance during the current academic year. Education Department, *Education Statistics New York State* 13 (Jan. 1977). They will study in a variety of institutions and programs: approved college programs, hospital school programs of professional nursing, two-year programs in registered private business schools, degree programs in trade or technical schools (A. 87-8). Some graduates undoubtedly will exercise political leadership. Some will find leadership roles outside politics — in education, the professions, business, or the arts. There is no law which precludes immigrants from seeking these leadership roles. Many will simply utilize their education to obtain better jobs.

There is also no guarantee that prospective citizen leaders will participate in New York's political community, or any other. Citizens are not required to vote; neither are exit visas required. The state seeks no commitment from citizen recipients of assistance that they will remain in the United States or in New York, nor does it require that its future "citizen leaders" register

and vote. These are voluntary undertakings; to require otherwise would raise serious constitutional questions.

Even if the state is entitled to grant or deny aid on the basis of a prediction whether a person will participate in the political process, the means it has selected to make the prediction is neither necessary nor precisely drawn. The favored citizen may never vote or seek office. He may move from New York or from the United States. The immigrant, on the other hand, may decide at a future time to become a citizen, reside in New York, and vote.

E. *The Interests of Immigrants in this Matter are Substantial.*

New York has made the judgment that persons whose incomes are below stated levels need assistance if they are to receive a higher education. This judgment is as valid for immigrants below the levels fixed as it is for citizens. The denial of assistance may mean the denial of an education. The consequence of that denial is severe in an economy which often demands that job applicants satisfy high educational requirements. The state imposes educational requirements for many positions in its own civil service, and additionally imposes educational requirements for licenses it issues: *e.g.*, teachers, N.Y. Educ. Law §3001 (2) (McKinney Supp. 1976-77); doctors, *id.*, §6524 (2) (McKinney 1972); physical therapists, *id.*, §6534 (2); chiropractors, *id.*, §6554 (2), etc. It also imposes a duty on male immigrants and citizens alike to support their families. N.Y. Fam. Ct. Act §§412-13 (McKinney 1975).

The immigrant, whether or not he will petition for naturalization, participates in the economy and shares the obligations of citizens. This Court has previously noted the obligation of immigrants to pay Federal taxes as well as serve in the armed forces. *In re Griffiths*, 413 U.S. at 722. Immigrants residing in New York, like New York citizens, are "resident

individuals" and subject to New York's personal income tax. N.Y. Tax Law §605 (a) (McKinney 1975). They contribute, along with citizens, to a state budget out of which $1,245,200,000 has been appropriated this fiscal year to support postsecondary education. The Regents Statewide Plan for the Development of Postsecondary Education 117 (1976).[47] The government contribution to all institutions of higher learning in New York amounts to more than a third of the annual revenues of these institutions. *Id.* at Table B-17. The state does not insist that immigrants be naturalized before they may be taxed.

There is an important non-financial interest involved. The state requires that immigrants who are eligible for citizenship apply before they may receive assistance, or that those who are not yet eligible declare that they will apply as soon as eligible. The naturalization laws of the United States, as will be discussed subsequently, do not impose any outer limit on the time an immigrant may petition for naturalization. As long as the immigrant retains his continuous residence and his good character, the naturalization laws in no way act to hurry his decision. The decision whether to be naturalized is of great significance to an immigrant. He has a deep interest in being able to make that decision free of financial pressures created by a state law.

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[47] $198.1 million of the total is direct aid to students. Tuition and scholarship assistance is viewed by all concerned as one of several ways in which governments finance postsecondary education. Regents Statewide Plan 110-24; The National Commission on the Financing of Postsecondary Education, Financing Postsecondary Education in the United States (1973). Tuition assistance is channeled through students. Other assistance is provided directly to schools. The sum of this assistance permits institutions to provide education to students who could not otherwise afford a "market cost." The logic of the state's argument is that immigrants may be denied the benefit of all government assistance to postsecondary education.

II

The citizenship provision of New York's Education Law is invalid under the supremacy clause.

The supremacy clause restricts state power over aliens "to the narrowest of limits." *Hines v. Davidowitz*, 312 U.S. 52, 68 (1941). The principle is fully stated in *Takahashi v. Fish and Game Commission*, 334 U.S. 410, 419 (1948):

> [States] can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states. State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration . . . .

Twice recently this Court has referred to both the supremacy and equal protection clauses when invalidating state restrictions on lawfully admitted aliens. *Graham v. Richardson*, 403 U.S. at 376-80; *Examining Board v. Otero*, 96 S.Ct. at 2283.

Last year the Court sustained a California statute which made it illegal to employ aliens not entitled to lawful residence in the United States if their employment adversely affected lawful resident workers. *DeCanas v. Bica*, 424 U.S. 351 (1976). The California law was directed against aliens who had no right under federal law to enter this country. It was "harmonious" with federal law, *id.* at 356, and there was evidence that Congress contemplated the enactment of "consistent" state regulations, *id.* at 361. The Court specifically noted that "state regulation not congressionally sanctioned that discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional burdens not contemplated by Congress." *Id.* at 358 n.6.

State legislation must yield to national legislation when state law "stands as an obstacle to the accomplishment and execution

of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. at 67. The Court has frequently adhered to this test, even when it has divided on its application. *Perez v. Campbell*, 402 U.S. 637, 650 (1971). The citizenship provisions of New York's education law do, in fact, frustrate the full effectiveness of both the nation's immigration and naturalization laws.

The selection system in the Immigration and Naturalization Act was extensively revised by Congress in 1965. President Johnson's message, proposing the elimination of the Act's national quota provisions, stressed that the administration bill would "serve to promote the reuniting of families — long a primary goal of American immigration policy," and that provisions for the admission of persons with skill or attainment would be "especially advantageous to our society." 111 Cong. Rec. 687 (1965). Both House and Senate Reports emphasized that the "reunification of families is to be the foremost consideration," and that the new selection system would be "fair, rational, humane, and in the national interest." H.R. Rep. No. 745, p. 12, S. Rep. No. 748, p. 13, 89th Cong., 1st Sess. (1965). On the floor the sponsors of the bill emphasized the same theme. Senator Kennedy stated that the bill "reflects our strong humanitarian belief in family unity as well as personal merit." 111 Cong. Rec. 24227 (1965). In the House, Congressman Feighan asserted that "family unity is made the first and foremost objective of the new system," and that those people admitted because of their skills would "substantially benefit the national economy, cultural interests or welfare of the United States." 111 Cong. Rec. 21585 (1965).

Family unity is encouraged by the admission of immediate relatives — children, spouses, and parents of United States citizens — free of numerical limitation. 8 U.S.C. §1151 (1970). Then, for persons in the Eastern Hemisphere, seventy-four per cent of the preferences granted by the Act favor relatives of

citizens or aliens. Unmarried children of citizens have first preference; the spouses and unmarried children of permanent resident aliens have second preference. 8 U.S.C. §1153 (a) (1, 2) (1970). Subsequent preferences are granted to married sons or daughters and brothers or sisters of citizens. 8 U.S.C. §1153 (a) (4, 5) (1970). The admission of skilled individuals, and others prepared to work in fields in which there is a domestic labor shortage, accounts for an additional twenty per cent of preferences. 8 U.S.C. §1153 (a) (3, 6) (1970). To protect domestic workers the Congress requires that intending immigrants in these preference categories, as well as Western Hemisphere immigrants, obtain a certification from the Secretary of Labor that there is a labor shortage for the skills they have and that domestic wages and working conditions will not be adversely affected. 8 U.S.C. §1182 (a) (14) (1970). The certification requirement does not apply to persons admissible as relatives of United States citizens or resident aliens.

Federal law places few limitations on the activities of immigrants. They must register annually, 8 U.S.C. §1302 (1970), and may be deported for certain criminal or political activity. 8 U.S.C. §1251 (1970). Otherwise, neither the Immigration and Naturalization Act, nor the regulations of the Immigration and Naturalization Service, impose restrictions on the participation by immigrants in the social and economic life of this country.

In contrast, there are considerable restrictions on nonimmigrants. Temporary visitors and aliens in transit may not work. 8 C.F.R. §214.1 (c) (1975). Students may work, but only if they receive permission to do so. *Ibid.* If they claim that economic necessity requires them to work, they must establish that it arose after entry. *Id.*, §214.2 (f) (6). A student who wishes to transfer to another school must receive permission from immigration authorities. *Id.*, §214.2 (f) (4).

The purposes and objectives of Congress are to facilitate the immigration of family members and persons with needed skills.

They must register and refrain from proscribed activities which may result in deportation; otherwise, the immigration laws leave them free to live as others do. The breadth of this freedom is emphasized by the contrast to nonimmigrants, whose activities are controlled in great detail by federal immigration law and regulations. State laws which restrict the freedom of immigrants are obstacles to the full accomplishment of federal objectives and must fall under the supremacy clause. It is inconsistent with the federal goal of family unification for New York to impede the education which Mauclet may require to support his family to the best of his abilities.

The problem is well illustrated by state scholarship and grant laws. All but three states have programs to provide tuition or scholarship assistance to students pursuing postsecondary education. These programs vary greatly from one another in the kind and degree of assistance provided. A majority of states impose no citizenship requirement; numbers, however, have some requirement. Some require citizenship by statute; others do so by administrative rule. Survey of state programs, brief appendix A-1. The ability of a financially needy immigrant to receive an education depends on the consequence which the state in which he resides attaches to his immigrant status.

An immigrant may be expected to know basic facts about his status and the governance of this country. He will not be permitted to hold office or vote anywhere in the nation. The national government may limit his access to some federal programs, no matter where he chooses to live. Federalism permits states to have widely different approaches to matters such as higher education. If the degree of state assistance is relevant to an immigrant in choosing his residence, then he must acquaint himself with the laws and programs of different states. In this regard his burden is no different from that of citizens.

An immigrant should not be required, however, to inquire further and learn the catalogue of special disabilities which

individual states have devised for him. It is national law which creates the status an immigrant enjoys. The quality of the nation's invitation to immigrants to make this their permanent home should not be diminished state by state by a host of restrictions and burdens. The constitution requires that these restrictions yield to the supremacy of federal law.

The citizenship provisions of New York's education law also conflict with the full purpose and objectives of the naturalization laws. The conflict arises from the fact that state law imposes financial pressure on immigrants to decide whether or not to petition for naturalization in the minimum amount of time allowed by federal law.

From the first naturalization act in 1790, Congress has required a minimum period of residency in the United States before an immigrant may apply for naturalization. A period of residency "would give a man an opportunity of esteeming the Government from knowing its intrinsic value [and] was essentially necessary to assure us of a man's becoming a good citizen." 1 Annals of Cong. 1147-48 (Gales & Seaton eds. 1790). It would also serve as a period of "probation." *Id.* at 1153. The first act established a two-year residency period. Act of March 26, 1790, 1 Stat. 103. This was extended to five years, act of January 29, 1795, 1 Stat. 414; to fourteen years, act of June 18, 1798, 1 Stat. 566; and back to five years, act of April 14, 1802, 2 Stat. 153. Since 1802 the minimum residency has remained five years for most immigrants; the present statute requires "*at least* five years" of continuous residency. 8 U.S.C. §1427 (a) (1970) (emphasis added).

There has never been an outer limit on the time in which an immigrant may petition for naturalization. The residency provisions of the naturalization law have always been a minimum, never a maximum.

The second naturalization act, in 1795, added a requirement that a declaration of intention to become a citizen be filed three

years prior to a petition for naturalization. 1 Stat. 414. In 1909, Congress required that declarations be filed not less than two, nor more than seven, years before applying for citizenship. Act of June 29, 1906, Pub. L. No. 338, §4 (1-2), 34 Stat. 596. A delay in petitioning for naturalization beyond the seven-year expiration time for declarations of intention meant that a new declaration had to be filed. That in turn meant that an applicant would have to wait two additional years. This provision carried through the major codification of the nationality laws in 1940. Act of October 14, 1940, Pub. L. No. 853, §331, 54 Stat. 1137. The declaration requirement was repealed in 1952; one may still be filed, but it is not required by the naturalization laws. 8 U.S.C. §1445 (f) (1970).

The Congress has considered, utilized, and rejected requirements for early declarations of intention. No statement is required of an applicant prior to his petition, and no petition must be filed at the earliest time of eligibility or by any given time thereafter.

The minimum period of residency serves the national interest by assuring that an applicant has an opportunity to acquaint himself with the nation and its government. It also gives immigrants a period of time in which to consider whether or when to petition. The absence of a deadline assures that immigrants have an opportunity to continue their consideration of citizenship if they have not resolved the issue at the moment of first eligibility. As a case in point, Mauclet does not foreclose the possibility that he may petition for naturalization in the future. He was just not ready to do so at the time the state required it.

There is a peculiar consequence to the state scheme. There are favored groups who are entitled to petition for naturalization before others. Surviving spouses of United States citizens who die during military service may be naturalized without satisfying any period of residency. 8 U.S.C. §1430 (d) (1970). A spouse of a United States citizen may be naturalized after three years of

residency. *Id.*, §1430 (a). Whenever the nation extends the privilege of faster naturalization, New York in turn demands a faster decision: immediately for a surviving spouse, within three years for the spouse of a citizen.

The basic problem with the state's citizenship requirement, however, is that it may impel some people to petition for naturalization before they have satisfactorily resolved the important questions involved in that decision. Their financial needs and their desire for education may introduce elements into a process which is best left free of monetary pressures. Conversely, the citizenship requirement imposes a penalty on those who insist on their right under federal law to consider the matter beyond their first minute of eligibility. Certainly, the Congress has not created a system of financial rewards or punishments as part of its naturalization laws. In these circumstances, the supremacy clause prohibits the states from distorting the process by which immigrants become citizens of this nation.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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We wish to express our appreciation to Stewart O'Brien and Karen Rebrovich, law students at the State University of New York at Buffalo, for their assistance in the preparation of this brief.

APPENDIX A

Survey of Assistance Programs in Other States

SURVEY OF ASSISTANCE PROGRAMS IN OTHER STATES

The 8th Annual Survey of the National Association of State Scholarship and Grant Programs (1976) reports that all states now have student assistance programs except Alaska, Arizona, and Nevada. All available statutes were analyzed. We also requested specific information from program officials in all other states, including copies of rules, regulations, descriptive materials, and application forms. Many states sent documents; others summarized information in letters. Telephone calls were placed to program personnel when written responses were not received or were unclear. On the basis of the documentation available to us at this time, we are unable to verify the presence or absence of citizenship requirements in Colorado, Mississippi, Montana, Nebraska, New Mexico and Utah. Wyoming is also omitted; the program there may not be operational.

Category V contains an ambiguity. The present rule in Connecticut and Rhode Island is that an applicant be either a citizen or have taken steps to become a citizen. The first step toward becoming a citizen is entering this country as a permanent resident, or being adjusted to that status. We do not know whether the acquisition of permanent resident status satisfies the "first steps" requirement of these rules.

I. Statutes which require United States citizenship.

1. Arkansas; State Scholarship Program, 1975 Ark. Acts 238.

2. Florida; Professional and Practical Nursing Education, Fla. Stat. Ann. §§239.47-239.52 (West Supp. 1976).

3. Georgia; State Incentive Scholarships, Ga. Code Ann. §32-3706.1(a) (1976). The citizenship requirement is limited to students attending colleges or universities which are not branches of the University System of Georgia.

Statutes which require citizenship or permanent residence

4. Indiana; Educational Grants and Monetary State Scholarships, Ind. Code Ann. §§20-12-21-5 through 20-12-21-13 (Burns 1973); Freedom of Choice, Ind. Code Ann. §20-12-21-15 (Burns 1973).

5. Minnesota; State Scholarship Program and Grants-in-Aid Program, Minn. Stat. Ann. §§136 A.09-.131 (Supp. 1976).

6. Missouri; Financial Assistance Program, Mo. Ann. Stat. §173.215 (Vernon Supp. 1976).

7. West Virginia; State Scholarship Program, W. Va. Code §§18-22B-1 through 6 (1971).

II. Statutes which require citizenship or permanent residence.

1. Illinois; Grants Program, Ill. Ann. Stat. ch. 122, §30.15.7(a) (Smith-Hurd Supp. 1976); Scholarships Program, Ill. Ann. Stat. ch. 122, §§30.15.5-.7 (Smith-Hurd Supp. 1976).

2. Texas; Texas Assistance Grants, Tex. Educ. Code Ann. tit. 3, §56.014 (Vernon Supp. 1976). The statute requires that a student be a resident of Texas in order to be eligible for assistance. Texas Educ. Code Ann. tit. 3, §54.057 (Vernon 1972) requires that for an alien to receive resident status for fee purposes he must be in the United States under a visa permitting permanent residence or file a declaration of intent to become a United States citizen. Only a permanent resident may file a declaration of intention. 8 U.S.C. §1445(f) (1970).

3. Washington; Student Financial Aid Program, Wash. Rev. Code Ann. 28B.10.800-824 (1970). Students must be domiciled in Washington. *Id.*, 28B.10.810(2). "Any person not a citizen of the United States cannot establish a Washington domicile until such person is eligible and has applied for an immigration visa. . . ." 28B.15.013(4) (e).

III. Statutes which omit any requirement of citizenship.

A. Absence of citizenship requirement confirmed by published rules or policies.

1. Alabama; The Operating Procedures for the Alabama Student Assistance Program §5.8.2. A student is eligible if he is either a United States citizen or is in the United States for other than a temporary purpose and intends to become a permanent resident.

2. Hawaii; State Scholarship and Merit Scholarships, Haw. Rev. Stat. §304-15 (Supp. 1974). The statute requires residence. Board of Regents Rules Governing Determinations of Residency IX provides that an alien shall be classified as a resident only upon his admission to the United States for permanent residence.

3. North Dakota; Student Financial Assistance Program, N.D. Cent. Code §15-62.2-01 through 04 (Supp. 1975). North Dakota Student Assistance Program Application Form.

4. Ohio; Instructional Grants, Ohio Rev. Code Ann. §3333.12 (Page Supp. 1975). The Ohio Instructional Grants Program Rules and Regulations §B-3.c: "any alien holding an immigration visa . . . shall be considered as a resident of the State of Ohio for Ohio Instructional Grant purposes in the same manner as any other student."

5. South Carolina; Tuition Grant, S.C. Code §§22-91 to -95 (Supp. 1975) 1977-78 South Carolina Tuition Grant Application.

B. Absence of citizenship requirement confirmed by communication from program officials.

1. Idaho; Scholarship Program, Idaho Code §33-4303 through 4315 (Supp. 1976).

2. Iowa; Scholarship Program, Iowa Code Ann. §261.2(4) (West 1964); Tuition Grant Program, Iowa Code Ann. §§261.9-261.16 (West 1964); Vocational-Technical Grant, Iowa Code Ann. §261.17 (West Supp. 1975).

3. Maine; Tuition Equalization Fund, Me. Rev. Stat. tit. 20, §§2311-14 (Supp. 1976).

4. Massachusetts; General Scholarship, Mass. Gen. Laws Ann. ch. 15, §1D (West Supp. 1975).

5. North Carolina; Student Assistance Program, N.C. Gen. Stat. §§116-209.17 through .20 (1975).

6. New Hampshire; New Hampshire Incentive Program N.H. Rev. Stat. Ann. §§188-D:10 through 188-D:13 (Supp 1976).

7. New Jersey; State Competitive Scholarships, N.J. Stat. Ann. §18 A:71-1 to -15 (West 1968); Education Incentive Grants, *id.*, §§18 A:71-16 to -26; Tuition Aid Grants, *id.*, §18 A:71-41 to -49 (West Supp. 1976).

8. Oregon; Need Grants, Or. Rev. Stat. §348.260 (1973); Scholastic Grant, *id.*, §§348.230 to .250.

9. South Dakota; Student Incentive Grants, S.D. Compiled Laws Ann. §13-55 A (1975).

10. Texas; Texas Public Educational Grant, Tex. Educ. Code Ann. tit. 3, §56.035 (Vernon Supp. 1976).

11. Wisconsin; Student Financial Aid Programs, Wis. Stat. Ann. §§39.26-.47 (West Supp. 1976).

C. Presence of citizenship requirement confirmed by state publication.

1. Michigan; State Scholarship Program, Mich. Comp. Laws §§390.971-.980 (1976); Tuition Grant, Mich. Comp. Laws §§390.991-.999 (1976); Michigan Department of

Education, State Financial Aid Programs Can Help You Attend College.

D. Presence of citizenship requirement indicated by communication from program officials.

1. Louisiana; State Student Incentive Grant, La. Rev. Stat. §17: 3023.5 (West Supp. 1975).

2. Maryland; General Scholarship Program, Md. Code Ann. 77A §57 (1975).

E. Additional statutes which omit any requirement of citizenship. No other information available to indicate whether or not a requirement has been added by rule or policy.

1. Connecticut; Restricted Educational Achievement, Conn. Gen. Stat. Ann. §10-116h (West Supp. 1976).

2. Florida; Student Assistance Grants, Fla. Stat. Ann. §239.461 (West Supp. 1976); Florida Regents Scholars, Fla. Stat. Ann. §239.451 (West Supp. 1976).

3. Georgia; State Scholarship, Ga. Code Ann. §§32-3101 to 3110 (1976); State Incentive Scholarships, *id.*, §32-3706.1(a). The incentive scholarships statute establishes different standards for public and private schools. Students attending a branch of the University System of Georgia need only be residents of the state.

4. Illinois; General Assembly Scholarships, Ill. Ann. Stat. ch. 122, §30-9 (Smith-Hurd Supp. 1976).

5. Kansas; State Scholarship, Kan. Stat. §§72-6801 to 15 (Supp. 1975).

6. Kentucky; Assistance to Private College Students, Ky. Rev. Stat. §§164.780 and 164.785 (Supp. 1976); Other Grants and Scholarships, *id.*, §§164.740 to 764.

7. Oklahoma; Tuition Aid Grant, Okla. Stat. Ann. tit. 70 ch. 3, §626.1 to 10 (Page 1972).

8. Tennessee; Tuition Grants, Tenn. Code Ann. §§49-5013 to 5021 (Supp. 1976).

9. Vermont; Scholarship Program, Vt. Stat. Ann. tit. 16, §§2821-28 (Supp. 1976).

10. Virginia; Virginia Tuition Assistance Grant and Loan Act, Va. Code §§23-38.11 to .18 (Supp. 1976).

IV. Statutes which require citizenship in some circumstances and permanent residence in others.

1. California; California Educational Grant Program, Cal. Educ. Code §§40400 through 40415 (West 1976). Sec. 40404 requires that "a Cal. Grant recipient shall be a citizen of the United States or, if he is under 21 years of age and not a citizen of the United States, either he or his parent or parents must have been admitted to the United States on a permanent resident visa." As a practical matter, this means that most undergraduate permanent residents will qualify for assistance.

V. Programs for which a statute or rule requires that applicants be citizens or taking steps to become citizens.

1. Connecticut; State Scholarship Program, Conn. Gen. Stat. Ann. §10-116b to 116d (West Supp. 1976). The statute contains no citizenship requirement. The state's informational pamphlet states that an applicant must be either a citizen or taking steps to become a citizen.

2. Pennsylvania; The Higher Education Grant Program, Penn. Stat. Ann. tit. 24, §§5151 to 5159 (Purdon Supp. 1976). The statute requires that an applicant be either a citizen or taking steps to become a citizen. A legal opinion of the Penn-

sylvania Attorney General, dated January 15, 1973, states that applicants for state scholarships and grants should be evaluated without regard to citizenship and this portion of the statute be considered unconstitutional and unenforcible. The absence of a citizenship requirement is confirmed by the most recent state publication describing the Higher Education Grant Program, Keys to Student Aids for Pennsylvanians.

3. Rhode Island; State Scholarship Program, R.I. Gen. Laws, §16-37-1 to -31 (1969). The statute contains no citizenship requirement. Rhode Island State Scholarship Program Rules and Regulations I A (revised August 1970) require that an applicant be either a citizen or taking steps to become a citizen.

VI. Statutes which define residency in terms of citizenship.

1. Delaware; Higher Education Scholarship, Del. Code tit. 14, §§3401-05 (1974). To be eligible, a student must be a resident of the state; there is no express citizenship requirement. However, section 3403(b) (1) states the residence of a student under 21 years of age must be "determined by the legal residence of his parent . . . who must have qualified as a registered voter in Delaware. . . . In the case of a student over 21 years of age, he must have qualified as a registered voter."

APPENDIX B

Legislative and Executive Documents

LEGISLATIVE AND EXECUTIVE DOCUMENTS

1. Joint Legislative Committee to Revise and Simplify the Education Law, Higher Education Staff Report No. 8 (February 21, 1969). This document, as it is now found in the New York Library, contains a number of handwritten deletions and insertions. The document is reproduced in this appendix to show these deletions and insertions. The tables on B-3 and B-4 have been photographed; an X has been placed over Proposal No. 1 on B-5 to indicate a similar mark on the document presently on file. The X indicates that Proposal No. 1 was superseded on February 22, 1969 by the memorandum reprinted on B-13. Staff Report No. 8 is on file in the veto jacket for S.5676-A, 1969 Session.

2. Joint Legislative Committee to Revise and Simplify the Education Law (February 22, 1969). This document also, as it is now found in the New York State Library, contains handwritten additions and alterations. One handwritten addition is photographed on B-13; the italicized entries on B-14 reflect handwritten amendments. The document is on file in the veto jacket for S.5676-A.

3. Joint Legislative Committee to Revise and Simplify the Education Law, Revised Higher Education Staff Report No. 9 (April 23, 1969). Filed in the bill jacket for 1969 N.Y. Laws ch. 1154.

4. Joint Legislative Committee to Revise and Simplify the Education Law, Senate Memorandum S.5675 (April 30, 1969). Filed in the bill jacket for 1969 N.Y. Laws ch. 1154.

5. Budget Report on Bills, Senate 4606 B (May 13, 1969). Filed in the bill jacket for 1969 N.Y. Laws ch. 1154.

6. State Education Department, Memorandum recommending approval of S.5606 B and S. 5676 A. Filed in bill jacket for 1969 N.Y. Laws ch. 1154.

JOINT LEGISLATIVE COMMITTEE TO REVISE AND SIMPLIFY THE EDUCATION LAW, HIGHER EDUCATION STAFF REPORT NO. 8 (FEBRUARY 21, 1969).

S 4606 PROPOSED REVISION TO
ARTICLE 13 EDUCATION LAW
A 6491 SCHOLARSHIPS, FELLOWSHIPS AND
SCHOLAR INCENTIVES

The attached bill is both a recodification and revision of Article 13 of the Education Law, which relates to financial assistance to New York State college students.

This bill clarifies the present law, removes obsolete language, and makes its provisions succinct and more orderly. It reduces the number of words from about 30,000 to 9,000 and the number of sections from 31 to 24.

Substantive Changes

The following substantive changes in the proposed law are recommended:

Joint Legislative Committee to Revise and Simplify the Education Law, Higher Education Staff Report No. 8 (February 21, 1969).

Proposal No.	Purpose	Estimated 1st Year Cost
	I. SCHOLAR INCENTIVE	
A. 1	Eliminate minimum scholar incentive grant.	Savings of $8,000,000
B. 2	Increase the value of undergraduate awards to low-income students and reduce the value of graduate awards.	-3,500,000
C. 3	Allow Regents to establish more appropriate academic eligibility standards for scholar incentive aid.	75,000
D. 4	Provide that U. S. War Orphan benefits do not reduce scholar incentive.	40,000
E. 5	Require U. S. citizenship for scholar incentive.	Savings of 10,000

Joint Legislative Committee to Revise and Simplify the Education Law, Higher Education Staff Report No. 8 (February 21, 1969).

II. REGENTS COLLEGE SCHOLARSHIPS

F. 6	Allow use of regents college scholarships for five years.	$ 80,000
G. 7	Eliminate regents college scholarship examinations abroad.	0

III. NURSING

H. 8	Extend scholar incentive aid and regents college scholarships to students in hospital nursing schools.	700,000
I. 9	Permit use of basic nursing scholarships for five years.	5,000
J. 10	Permit use of basic nursing scholarships in either collegiate or hospital nursing programs.	0
K. 11	Allocate basic nursing scholarships on the basis of population.	0

IV. REGENTS WAR SERVICE SCHOLARSHIPS

L. 12	Establish 600 additional regents war service scholarships.	105,000*
M. 13	Allocate war service scholarships on the basis of population.	0
	Total Net Savings	$3,505,000

*This is an increase of 300 scholarships over the Governor's request. (S 1693, A 2306)

Joint Legislative Committee to Revise and Simplify the Education Law, Higher Education Staff Report No. 8 (February 21, 1969).

Further comments and the budgetary implications of the recommended substantive changes are contained on the following pages of this staff report.

I. SCHOLAR INCENTIVE

A. *Proposal No. 1:* Eliminate the minimum *scholar incentive* award for students whose parental net taxable income is in excess of $10,000. This is an average gross income for a family of four of $13,800.

Section of Proposed Bill: §611 sub 3

Comment: The present law provides a minimum scholar incentive award of at least $100 a year to all qualified students for undergraduate study; $200 for first year graduate study; and $400 for other graduate study. By eliminating this minimum from high income students, additional funds would be available to assist more needy students. It is estimated that 60,000 minimum awards would be abolished and that some of the funds would be redistributed to help 53,000 low income students (See Proposal No. 2).

Budgetary Implication: This proposal would save $8,000,000, part of which then could be redistributed to students of lower income families.

B. *Proposal No. 2:* Increase the value of undergraduate awards to low income students and reduce the value of graduate awards.

Section of Proposed Bill: §611 sub 3

Comment: At present, the amount of scholar incentive payment is dependent upon a three way classification of

parental income. This proposal establishes a five way classification of income which, in effect, would increase support for low income undergraduate students by raising the value of the maximum award from $500 to $600, and by increasing the next largest award from $200 to $300. Also, the income brackets are changed to reflect a modest inflationary adjustment. Awards for undergraduate and graduate study are identical. Under this proposal some 8000 graduate students would receive less money than they now receive. The present and proposed award structures are:

	Present Annual Awards			
*Average Gross Income	Selected Net Income	Under-grad.	1st Yr. Grad.	Other Grad.
Under $4,700	Under $1,800	$500	$600	$800
4,700-11,000	1,800-7,500	200	300	600
Over 11,000	Over 7,500	100	200	400

	Proposed Annual Awards			
*Average Gross Income	Selected Net Income	Under-grad.	1st Yr. Grad.	Other Grad.
Under $4,900	Under $2,000	$600	$600	$600
4,900-9,300	2,000-6,000	300	300	300
9,300-11,600	6,000-8,000	200	200	200
11,600-13,800	8,000-10,000	100	100	100
Over 13,800	Over 10,000	0	0	0

*Family of four.

Budgetary Implications: The estimated cost of this proposal is $3,500,000. The cost of increasing lower income awards is $5,500,000, but is partially offset by a savings of $2,000,000 realized from decreasing the value of graduate awards.

C. *Proposal No. 3:* Allow the Regents to establish appropriate academic standards for scholar incentive assistance for the first semester of college.

Section of Proposed Bill: §611 sub 1

Comment: The present law requires the Regents to establish criteria for academic qualification for the first semester of undergraduate or graduate study based on previous academic record or test scores, entirely apart from the college admission criteria. After the first semester, certification of probable success by the college establishes student eligibility.

The present requirement regarding first semester eligibility creates an inordinate amount of administrative work in the Education Department and places a heavy burden on the colleges and the student. Also, many deserving students may be deprived of scholar incentive assistance for the first semester of study. In particular, disadvantaged youths who may not have followed the usual college preparatory program are often denied first semester aid because they do not meet usual academic and test criteria. About one-third of the students in community colleges do not receive scholar incentive assistance, and it is believed that the present unrealistic first semester requirement is largely responsible.

This proposal would allow the Regents to accept matriculation into college as satisfying first semester eligibility for aid purposes, and make it possible for many needy students to obtain additional assistance.

Budgetary Implications: The estimated cost of this change $75,000.

D. *Proposal No. 4:* Provide that the receipt of U.S. War Orphan benefits, like G. I. benefits, shall not reduce the amount of *scholar incentive* aid.

Section of Proposed Bill: §611 sub 4

Comment: The present law provides that scholar incentive payments shall be limited by U.S. War Orphan benefits, but not by G.I. benefits. Since both these types of benefits are similar, they should be treated the same way.

Budgetary Implication: The estimated cost is $40,000.

E. *Proposal No. 5:* Require United States citizenship for *scholar incentive* assistance.

Section of Proposed Bill: §602 sub 2

Comment: Citizenship is presently required to be eligible for all award programs except scholar incentive. It is proposed that citizenship be made a uniform requirement. About fifty students would be affected by this change.

Budgetary Implication: The estimated savings is $10,000.

II. REGENTS COLLEGE SCHOLARSHIPS

F. *Proposal No. 6:* Allow use of *regents college scholarships* for five years of undergraduate study, if the program normally requires five years for completion.

Section of Proposed Bill: §612 sub 4

Comment: Regent college scholarship winners may now use their awards for only four years. Thus, award winners enrolled in programs normally requiring five years (e.g. pharmacy and architecture) do not receive the award for the duration of the college program. It is proposed that the

award period for regents college scholarships be made five years, thereby making it consistent with that of the scholar incentive program.

Budgetary Implication: The estimated annual cost of this change is $80,000.

G. *Proposal No. 7:* Delete requirements that *regents college scholarship* examination be administered to candidates abroad.

Comment: The present law requires that the regents scholarship examination be given to eligible students who are abroad in spite of the fact that such students may take this examination after entering college without loss of benefits. It is administratively difficult to give the exam abroad, and adequate security arrangements cannot be guaranteed.

Budgetary Implication: Small savings from reduction in administrative workload.

III. NURSING

H. *Proposal No. 8:* Extend *scholar incentive assistance and regents college scholarships* to students enrolled in hospital school nursing programs.

Section of Proposed Bill: §602 sub 5

Comment: Under the present statute, students who attend hospital nursing schools are not eligible to receive scholar incentive or regents college scholarship benefits. Because of the critical need for trained nurses, the removal of this restriction is recommended. Nursing programs at hospital schools are three years in length and must be approved by the Board of Regents.

Budgetary Implication: The estimated cost of this change is $700,000. About 6000 student nurses at 54 hospitals would benefit. The recruitment of student nurses by hospital nursing schools would be facilitated.

I. *Proposal No. 9:* Permit *basic nursing scholarships* to be used for five years if the program normally requires five years for completion.

Section of Proposed Bill: §621 sub 3

Comment: The present law limits use of basic nursing scholarships to four years. Inasmuch as some students are enrolled in five year programs, it is recommended that such students be aided for the duration of the total program instead of having assistance curtailed in the last year of the program. This would enable students to seek additional training which would qualify them as teachers of nursing, thereby reducing the shortage of such people.

Budgetary Implication: The estimated cost is $5,000.

J. *Proposal No. 10:* Permit any of the 600 *basic nursing scholarships* to be used in either a collegiate or a hospital nursing program.

Section of Proposed Bill: §621 sub 1

Comment: The present statute limits the use of the 600 basic nursing scholarships to 300 in collegiate nursing programs and 300 in hospital nursing programs. Such limitation has been found to be unnecessary, restrictive and confusing and increases the high rate of declination of these awards which has resulted in failure to award all authorized

scholarships. The proposed change would provide a broader choice of programs to students.

Budgetary Implication: No added cost.

K. *Proposal No. 11:* Allocate *basic nursing scholarships* on the basis of population rather than on the basis of assembly districts as they existed in 1964. Use 1968-69 allocation as the save-harmless.

Section of Proposed Draft: §621 sub 2

Comment: It no longer seems reasonable to allocate these scholarships on the basis of 1964-65 assembly districts prior to redistricting. The proposed change would allocate basic nursing scholarships in relation to the proportion of a county's population to the total population of the state.

The save-harmless clause insures that no county would "lose" scholarships. The real import of this bill will be felt if the number of such scholarships is increased.

Budgetary Implication: No added cost.

IV. REGENTS WAR SERVICE SCHOLARSHIPS

L. *Proposal No. 12:* Increase the amount of *regents war service scholarships for veterans* from 300 to 600.

Section of Proposed Bill: §614 sub 1

Comment: At present, there are 300 war service scholarships in use. Unless new scholarships are established there will be no opportunity for returning veterans of the Viet Nam conflict to use such scholarships. The Governor has requested 300 such scholarships for 1969-70 (S 1693, A

Joint Legislative Committee to Revise and Simplify the Education Law, Higher Education Staff Report No. 8 (February 21, 1969).

2306) at a cost of $105,000. In 1968-69, when the last 300 veterans scholarships were awarded, over 1400 applicants filed for these scholarships.

Budgetary Implication: The estimated cost is $105,000.

M. *Proposal No. 13:* Allocate *war service scholarships* on the basis of population rather than on the basis of assembly districts as they existed in 1964. Use the 1967-68 allocation as a save-harmless.

Section of Proposed Bill: §614 sub 2

Comment: Same as No. 11.

Budgetary Implication: No added cost.

JOINT LEGISLATIVE COMMITTEE TO REVISE AND SIMPLIFY THE EDUCATION LAW (FEBRUARY 22, 1969).

B - 60,000 students now receiving minimum grant
50 - 60,000
$6,000,000 savings on min. undergrad. award if dropped today

S 4606-A
A 6491-A

This memorandum supercedes Proposals A1 and B2 of Higher Education Staff Report No. 8, February 21, 1969.

PURPOSE

The purpose of this bill is to establish a new scholar incentive formula and to make other changes regarding the use and eligibility of scholar incentive and regents college scholarships.

Equally important, this bill negates the need for a five percent cutback in last quarter 1968-69 financial assistance and for all 1969-70 awards.

This bill provides for the following:

(1) The present scholar incentive formula for undergraduates, including the minimum $100 award, would still be in effect through the school year 1971-72 for students currently receiving such undergraduate awards.

(2) A modified scholar incentive formula would be in effect for beginning freshmen in school year 1969-70. This formula would be identical to the present one for students with incomes under $10,000, however, undergraduate students with incomes in excess of $10,000 would not receive any award. By eliminating the $100 grant for students with incomes over $10,000, this

would save $2 million in school year 1969-70 and $1.5 million in fiscal year 1969-70.

(3) For freshman students, ~~awards~~ *beginning in awards* in 1970-71 would be paid on the basis of a new formula. (see attached memo)

(4) For graduate students, a new graduate scale would be put into effect in school year 1969-70. This scale reduces the value of graduate awards and eliminates awards for students with incomes over $10,000. The 1969-70 school year saving of this proposal is $4,100,000 and the fiscal year saving is $3,100,000.

COMMENTS:

The thrust of the proposal is to save harmless all present undergraduates, put graduates on the new formula immediately, and phase in the new formula for undergraduates, beginning school year 1970-71 on a year-by-year basis.

OTHER CHANGES:

This bill also extends scholar incentive to hospital nursing schools and private business schools. It also permits use of scholarships for five years, establishes 600 war service scholarships and eliminates the limitation as to where basic nursing scholarships must be used, although they still must be used in the State.

FISCAL YEAR 1969-70 SAVINGS

(In Millions)

	Savings	Increase
1. Eliminate minimum award for freshmen over $10,000 in 1969-70	$ 1.5	
2. New formula for graduate students (including reduced awards and loss of awards over $10,000 in 1969-70)	3.1	
3. New costs		$ 1.1*
	$ 4.6	$ 1.1

$ 4.6 Savings
1.1 New Costs

$ 3.5 Fiscal Year Savings

SUMMARY OF NEW COSTS

Include U.S. War Orphan Benefits for Scholar Incentives	$ 21,500
Allow Regents College Scholarships for Five Years	50,000
Scholar Incentives for Hospital Nursing Students	505,000
Allow Basic Nursing for Five Years	3,500
Additional 300 War Service Scholarships	80,000
Scholar Incentives for Private Business Schools	440,000
	$1,100,000

JOINT LEGISLATIVE COMMITTEE TO REVISE AND SIMPLIFY THE EDUCATION LAW, REVISED HIGHER EDUCATION STAFF REPORT NO. 9 (April 23, 1969).

S 4606-B PROPOSED REVISION TO
ARTICLE 13 EDUCATION LAW
A 6491-A SCHOLARSHIPS, FELLOWSHIPS AND
SCHOLAR INCENTIVES

This bill is both a recodification and a revision of Article 13 of the Education Law, which relates to financial assistance to New York State college students.

This bill clarifies the present law, removes obsolete language, and makes its provisions succinct and more orderly. It reduces the number of words from about 30,000 to 9,000 and the number of sections from 31 to 24.

Major Substantive Change:

The major change contained in this proposal affects the formula by which college students receive scholar incentive assistance.

At present all students are eligible for scholar incentive assistance, regardless of income level. This bill would gradually phase in a new formula which would eliminate the minimum award for higher income undergraduate students. Undergraduates who are now receiving the minimum award would continue to do so until they receive their bachelors degrees.

In the 1969-70 school year and in subsequent school years, beginning freshmen with family incomes in excess of $20,000 would not receive scholar incentive assistance. In the 1970-71 school year those new students with family incomes under $8,000 would receive $100 more than similar students now

receive. Students with parental incomes between $8,000 and $20,000 would continue to receive $100.

Beginning with the 1970-71 school year and for the following three school years, the new scholar incentive formula would be applied to an additional group of incoming freshmen students. Thus, by 1974-75 all students would be on the new formula.

Beginning with the 1969-70 school year, graduate students would be eligible to receive scholar incentive assistance on the new formula. Graduate students with incomes over $20,000 would not receive assistance and all other graduate students would receive less money than they now receive.

Present Annual Awards

*Average Gross Income	Selected Net Income	Under-grad.	1st Yr. Grad.	Other Grad.
Under $4,700	Under $1,800	$500	$600	$800
4,700-11,000	1,800-7,500	200	300	600
Over 11,000	Over 7,500	100	200	400

Proposed Annual Awards

*Average Gross Income	Selected Net Income	Under-grad.	1st Yr. Grad.	Other Grad.
Under $4,900	Under $2,000	$600	$600	$600
4,900-9,300	2,000-6,000	300	300	300
9,300-11,600	6,000-8,000	200	200	200
11,600-25,000	8,000-20,000	100	100	100
Over 25,000	Over 20,000	0	0	0

*Family of four.

Joint Legislative Committee to Revise and Simplify the Education Law, Revised Higher Education Staff Report No. 9 (April 23, 1969).

Other Substantive Changes:

Other revisions contained in this proposal are described in this Committee's Staff Report No. 8. These provide for (1) the use of regents college scholarships for 5 years; (2) the use of basic nursing scholarships for 5 years; (3) scholar incentive assistance to students in hospital nursing schools; (4) scholar incentive assistance to students in two-year registered private business schools; (5) concurrent use of U.S. war orphan benefits and scholar incentive assistance; (6) 300 additional war service scholarships raising the total to 600; (7) the regents to establish more appropriate academic eligibility standards for scholar incentive assistance; (8) U.S. citizenship requirement for scholar incentive assistance (conforming to state scholarship provisions); (9) eliminating regents college scholarship examinations abroad; (10) basic nursing scholarships to be used in either collegiate or hospital nursing programs; (11) allocating basic nursing scholarships and war service scholarships on the basis of population rather than assembly districts, provided, however, that each assembly district be guaranteed the same number of basic nursing and war service scholarships that it has at present. The above changes to the State's financial aid program to college students would take effect in the 1969-70 school year.

Fiscal Year Implications:

This bill would save 2.2 million dollars in the 1969-70 fiscal year (see attached). Since this bill saves 2.2 million dollars, a 5% cut across the board on scholar incentive and regents college scholarship awards would not be necessary.

Joint Legislative Committee to Revise and Simplify the Education Law, Revised Higher Education Staff Report No. 9 (April 23, 1969).

FISCAL YEAR 1969-70 SAVINGS

(In Millions)

	Savings	Increase
1. Eliminate minimum award for freshmen over $20,000 in 1969-70	$ .5	
2. New formula for graduate students (including reduced awards and loss of awards over $20,000 in 1969-70)	2.8	
3. New costs		$ 1.1*
	$ 3.3	$ 1.1

$ 3.3 Savings
1.1 New Costs

$ 2.2 Fiscal Year Savings

SUMMARY OF NEW COSTS

Include U.S. War Orphan Benefits for Scholar Incentives	$ 21,500
Allow Regents College Scholarships for Five Years	50,000
Scholar Incentives for Hospital Nursing Students	505,000
Allow Basic Nursing for Five Years	3,500
Additional 300 War Service Scholarships	80,000
Scholar Incentives for Private Business Schools	440,000
	$1,100,000

JOINT LEGISLATIVE COMMITTEE TO REVISE AND SIMPLIFY THE EDUCATION LAW, SENATE MEMORANDUM S.5676 (APRIL 30, 1969).

SENATE MEMORANDUM S 5676

A CHAPTER AMENDMENT TO S 4606-B

(A bill to amend the education law
in relation to scholar incentives,
scholarships, and fellowships)

PURPOSE: This bill relates to the scholarship, fellowship and scholar incentive proposal introduced by the Joint Legislative Committee to Revise and Simplify the Education Law. The Joint Legislative Committee's proposal, as contained in S 4606-B, would establish a new scholar assistance formula for students attending New York State institutions of Higher Education.

This bill modifies the Joint Legislative Committee's proposed formula as contained in S 4606-B by eliminating the minimum $100 award for all undergraduate students with a net taxable family income of over $20,000, effective in the 1969-70 school year.

COMMENT: As proposed in S 4606-B, the Joint Legislative Committee's scholarship bill, all undergraduate students who have previously received scholar incentive assistance would continue to receive such aid regardless of family income status. New students with a net taxable family income of over $20,000 would not receive the minimum $100 award.

This bill would delete the $100 award for *all* undergraduate students with a net taxable family income of over $20,000 *even if such students previously received the $100 award.*

FISCAL IMPLICATIONS: This bill would save $900,000 in the 1969-70 fiscal year. It should be noted that S 4606-B has a fiscal year savings of 2.2 million. The combined effect of both these bills would save 3.1 million in the 1969-70 fiscal year.

BUDGET REPORT ON BILLS
SENATE 4606-B
(MAY 13, 1969)

30-Day Bill

Introduced by:
Messrs. Dominick, Bronston

Law: Education Sections: Article 13

Division of the Budget recommendation on the above bill:

Approve: ..... X ..... Veto: .....

No Objection: ..... No Recommendation: .....

1. *Subject and Purpose:* This bill will establish a new scholar incentive award schedule and make other changes regarding the use and eligibility of Scholar Incentive Awards and Regents College Scholarships.

2. *Summary of provisions of bill:*

   Bill Section 1: Repeals present Article 13 of the Education Law related to Scholarships, Fellowships, Scholar Incentive Awards and other award programs for higher education.

   Bill Section 2: Repeals present Section 5710 of the Education Law related to Regents Scholarships at Cornell University.

   Bill Section 3: Recodifies into a new Article 13 and generally simplifies present provisions related to Scholarships, Fellowships and Scholar Incentive Awards.

   The present schedule of Scholar Incentive Awards in relation to net taxable income would be replaced by a new schedule in relation to net taxable income as follows:

Present Annual Scholar Incentive Awards

Net Taxable Income	Under-grad.	1st Yr. Grad.	Other Grad.
Under $1,800	$500	$600	$800
1,800-7,500	200	300	600
Over 7,500	100	200	400

Proposed Annual Scholar Incentive Awards

Net Taxable Income	Under-grad.	1st Yr. Grad.	Other Grad.
Under $2,000	$600	$600	$600
2,000-6,000	300	300	300
6,000-8,000	200	200	200
8,000-20,000	100	100	100
Over 20,000	0	0	0

The new schedule of payments as it pertains to undergraduates would be modified, however, by the provisions contained in bill Sections 4 and 5.

Eligibility for the use of the Scholar Incentive Awards is extended, under this bill, to (a) students who receive United States War Orphan benefits, (b) students in hospital nursing schools and, (c) students in an approved two-year program in a registered private business school.

The number of Regents College Scholarships that may be awarded each year is fixed at 18,843; Scholarship use is extended to five years (instead of the present four) for programs of study that normally require five years; there is no change, however, in the amount of the Scholarships in relation to net taxable income.

The number of Regents War Service Scholarships for Veterans that may be annually awarded is fixed at 600 compared to the 300 that are currently awarded.

The Regents Scholarships in Cornell University are brought into the new Article 13 and made subject to its general provisions.

Bill Section 4: The present scholar incentive schedule of payments in relation to income, including the minimum $100 award would remain in effect through the school year 1971-72 for undergraduate students currently receiving such undergraduate awards.

Bill Section 5: A modified scholar incentive schedule of payments in relation to income would be in effect for beginning freshmen in school year 1969-70. This schedule would be unchanged from the present where income did not exceed $20,000. Where income exceeds $20,000 the award would be eliminated.

Bill Section 6: The bill would become effective July 1, 1969.

3. *Prior legislative history:* Not relevant to the consideration of this bill.

4. *Arguments in support of bill:* This bill was introduced at the request of the Joint Legislative Committee to Revise and Simplify the Education Law. The recodification of Scholarships, Fellowships and Scholar Incentive Awards carries out the Committee's work in this regard.

   The bill extends use of the Scholar Incentive Awards to students in hospital nursing schools and private business schools and doubles the number of War Service Scholarships. By eliminating the minimum scholar incentive awards for students whose parental net taxable income is in excess of

Budget Report on Bills, Senate 4606-B (May 13, 1969).

$20,000, additional funds would be made available for redistribution to assist more needy students.

5. *Possible objections to bill:* Public reaction can be expected on behalf of graduate students whose awards will be reduced beginning in 1969-70 and on behalf of those becoming undergraduates in 1970-71 and thereafter who would no longer be eligible for a minimum scholar incentive award.
6. *Other state agencies interested:* Education Department.
7. *Position of other organizations:* Not available.
8. *Budget implications:* The net fiscal effect of this bill during the State fiscal year 1969-70 is a saving of $2.2 million. It offers an opportunity to utilize the savings as a partial alternative to a five per cent reduction in individual grants to attain the expenditure reduction mandated in the supplemental budget.
9. *Recommendation:* Any action on this bill Senate 4606B should be taken only with simultaneous consideration of Senate bill 5676A which would amend this bill by removing the save harmless for all present undergraduates contained in bill Section 4 of S.4606B and provide a further savings of about one million dollars.

The Division of the Budget recommends approval of S.4606B on the basis of No. 4 above and on account of the alternative offered in No. 8 above.

T. N. Hurd
Date: May 13, 1969 Examiner: Harold Sigsbee

Disposition: Chapter No. Veto No.

STATE EDUCATION DEPARTMENT MEMORANDUM RECOMMENDING APPROVAL OF S. 4606-B and S. 5676-A

May 14, 1969

TO: Counsel to the Governor

FROM: Robert D. Stone

SUBJECT: S 4606-B
S 5676-A

RECOMMENDATION: APPROVAL

REASONS FOR RECOMMENDATION:

Both bills were sponsored by the Joint Legislative Committee to Revise and Simplify the Education Law.

With the exception of providing scholar incentive aid for students attending registered private business schools, the formula for scholar incentive aid and the provision of additional war service scholarships with an increase in the amount of such award, these bills represent enactment of a substantial proportion of this Department's program as advocated by the Board of Regents.

In addition to revising and simplifying the law relating to student financial assistance, these bills provide an estimated savings of $3,100,000.00 for the State fiscal year 1969-70.

FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-208

EWALD B. NYQUIST, Commissioner of Education of the State of New York, and NEW YORK STATE HIGHER EDUCATION SERVICES CORPORATION,

Appellants,

against

JEAN-MARIE MAUCLET,

Appellee.

EWALD B. NYQUIST, Commissioner of Education of the State of New York, THE UNIVERSITY OF THE STATE OF NEW YORK, THE BOARD OF REGENTS OF THE STATE OF NEW YORK, THE NEW YORK HIGHER EDUCATION ASSISTANCE CORPORATION, WILLARD C. ALLIS, DR. ERNEST BOYER, DR. JUDAH CAHN, WILMOT R. CRAIG, THOMAS P. DENN, WALTER A. KASSENBROCK, NORMA KERSHAW, REV. LAURENCE J. McGINLEY, S. J., WILLIAM G. MORTON and RUSSEL N. SERVICE, being the members of the board of directors of said corporation, and THE NEW YORK STATE HIGHER EDUCATION SERVICES CORPORATION,

Appellants,

against

ALAN RABINOVITCH,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURTS FOR THE WESTERN AND EASTERN DISTRICTS OF NEW YORK

REPLY BRIEF

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TABLE OF CONTENTS

Table of Cases

Constitutions, Statutes and Regulations Cited

Federal Constitution

New York Constitution

Federal Statutes

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ON APPEAL FROM THE UNITED STATES DISTRICT COURTS FOR THE WESTERN AND EASTERN DISTRICTS OF NEW YORK

REPLY BRIEF

A.

New York Education Law §661(3) is excepted from strict scrutiny.

Education Law § 661(3) does not distinguish between individuals on the basis of alienage or the "negative lack of American citizenship." Rabinovitch brief, p. 13. The

only distinctions drawn by the statute are "*within* the class of aliens." *Mathews* v. *Diaz,* 426 U.S. 67, 80 (1976) (Emphasis original). See Appellants' main brief, pp. 18-20.*

Appellees distinguish the classification reviewed in *Diaz, supra,* from § 661(3) on the ground that the former involved federal regulation of immigration and naturalization. Rabinovitch brief, pp. 12-13; Mauclet brief, pp. 14-15. Appellants do not question the power of federal government to pre-empt state legislation affecting aliens in appropriate circumstances. *Hampton* v. *Mow Sun Wong,* 426 U.S. 88, 100-101 (1976); *Mathews* v. *Diaz, supra* at 84-87. See discussion pp. 12-14 *post.* However, neither the existence nor the exercise of federal power over aliens determines whether a given classification is "based on alienage." *Graham* v. *Richardson,* 403 U.S. 365, 372 (1971). That conclusion can only be drawn from the inclusionary and/or exclusionary characteristics of the classification itself, matters irrelevant to the source of the legislative power. The classification in *Diaz* allowed Medicare benefits for citizens and aliens with permanent residence of at least five years, excluding all other aliens. 426 U.S. at 69-70. This Court concluded that the "real question" presented by the classification was "not whether discrimination between citizens and aliens is permissible," but whether the "dis-

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* The student aid programs at issue herein provide benefits for more aliens than the Medicare program considered in *Mathews* v. *Diaz, supra* at 69-70, i.e. student aid is available to certain permanent residents and to non-immigrant paroled refugees under § 661 (3) whereas Medicare benefits are limited to aliens with at least five years permanent residence. Appellants' main brief, p. 20. Appellee Mauclet disputes this point, stating that the residence requirement in Education Law § 661(5)(a), (b), bars non-immigrants from student aid. Mauclet brief, pp. 2-3. He cites a 1974-75 Student Payment Application (Pl. Ex. "A," A. 94). *Ibid.* Appellee fails to take note of the 1975 amendment to § 661(3) which added non-immigrant paroled refugees [8 U.S.C. § 1182(d)] to the aided class. L. 1975 c. 663, effective July 1, 1975. The application form cited predates this amendment. Moreover, appellee offers no basis for reading Education Law § 661(5)(a), (b) as denying non-immigrant refugees the benefits conferred upon them under § 661(3)(d) by the Legislature in its 1975 session.

crimination *within* the class of aliens—allowing benefits to some aliens but not to others—is permissible." 426 U.S. at 80. Emphasis original. Education Law § 661(3) allows student aid for citizens, aliens willing to become citizens, either presently or when relieved of a disability, and paroled refugees. Like the Medicare statute considered in *Diaz,* § 661(3) simply allows "benefits to some aliens but not to others." *Ibid.* In face of *Diaz,* it cannot be viewed as creating a classification "based on alienage." *Graham* v. *Richardson, supra.*

Even when alienage is used as a classifying criterion, it is not invested with, or divested of, a suspect quality for equal protection purposes depending upon whether it is used in a state or federal statute. Compare Rabinovitch brief, pp. 13-14; Mauclet brief, pp. 14-16. The latitude this Court has afforded federal statutes is based on the acknowledged difference in the scope of federal and state power over aliens, not upon an equal protection theory which would find alienage not suspect in all federal laws but suspect in all state laws. *Weinberger* v. *Wisenfeld,* 420 U.S. 636, 638 n. 2 (1975), stating that "[t]his Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." See *Mathews* v. *Diaz, supra,* at 80, 81-82, 84; *Hampton* v. *Mow Sun Wong, supra,* at 100-101. To the extent that it is drawn in question in these actions, Education Law § 661(3) provides gifts of state funds to students pursuing higher education who are citizens of the state and to aliens who are identified with the state interests involved in the program. The statute operates in an area which is free of federal concern and does not discriminate against anyone. See discussion pp. 8-9, *post.* Accordingly, there is no basis for more stringent review of § 661(3) under the Equal Protection Clause than was afforded the limitations on alien eligibility for Medicare in *Mathews* v. *Diaz, supra* at 77-80, 82-84.

Graham v. *Richardson, supra,* is not opposed. Therein Arizona's fifteen year alien residence for eligibility for

welfare was correctly identified with Pennsylvania's express citizenship requirement. The extraordinary durational extent of the Arizona requirement was tantamount to a denial of benefits, and therefore both the Arizona and Pennsylvania statutes were classifications "based on average". 403 U.S. at 372, 379-80. Additionally, the distinction drawn between federal and state regulation of welfare in *Mathews* v. *Diaz, supra* at 85, has no application. There may be "no apparent justification" for state welfare classifications that allocate "persons who are not citizens of the state into subcategories of United States citizens and aliens" since "there is little, if any, basis for treating persons who are citizens of another state differently from persons who are citizens of another country." *Ibid.* Under § 661(3), the American citizen who resides in another state and the alien who refuses to become a citizen of New York State are treated identically because no individual in either of the excluded classes advances New York's interests in the program. The excluded citizen participates in and has access to the political community of the state of his residence and is otherwise identified with that state. The excluded alien has refused full participation in the New York community, preferring to continue his identification with the country of his nationality. Compare Rabinovitch brief, p. 27.

Examining Board v. *de Otero,* 426 U.S. 572 (1976), *Sugarman* v. *Dougall,* 413 U.S. 634 (1973), and *In re Griffiths,* 413 U.S. 717 (1973), are consistent with appellants' position. Compare Mauclet brief, pp. 15-16. The classifications in the cited cases were in fact based on alienage and denied access to the means of earning a livelihood in substantial segments of the economy. The classifications in *Takahashi* v. *Fish Game Commission,* 334 U.S. 410 (1948), and *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886), referred to particular alien nationalities that were permanently excluded from citizenship. Education Law § 661(3) is not selective as to nationality and does not place any

obligation upon an alien which is beyond his capacity to meet. Compare Rabinovitch brief, p. 13.

Appellee Rabinovitch opposes the exception of § 661(3) from strict scrutiny on the additional ground that the statute does not benefit from the political community doctrine described in *Sugarman* v. *Dougall, supra* at 646-49. Rabinovitch brief, pp. 14-15. See Appellants' main brief, pp. 20-21. Appellee contends that § 661(3) does not aid in the definition and presentation of New York's political community because "it does not speak directly to a person's 'participation in [the state's] democratic political institutions.'" Rabinovitch brief, p. 15 quoting *Sugarman* v. *Dougall, supra* at 648. As the review of the prior decisions of this Court in *Dougall* makes clear, states retain the power and responsibility of qualifying their own officeholders and voters. 413 U.S. at 647-48. The student aid provided under Education Law § 661(3) is intended to enhance the educational opportunities of just those individuals and to increase their number as well as assisting the adjustment of refugees. See Appellants main brief, pp. 22-24. The statute is therefore tied directly to New York's democratic institutions.

B.

New York's interest in enhancing the educational level of its electorate and inducing membership are legitimate state goals. In providing gifts of state funds, New York may also select individuals who are willing to accept a complete identification with the state as distinguished from individuals who prefer another state or nation.

States have a recognized interest in the qualifications, educational level and numerical strength of their electorates which is separate and distinct from any national interest. *Sugarman* v. *Dougall, supra* at 647-48. See *Oregon* v. *Mitchell,* 400 U.S. 112, 124-31 (1970) (provision of Voting Rights Act of 1970 lowering voting age to 18 in state elections invalidated) (opinion of Black, J.); *id.*

at 201-203, 207-209 (Opinion of HARLAN, J.); *Pope* v. *Williams,* 193 U.S. 621, 632-34 (1904); *Luther* v. *Borden,* 7 How. 1, 40-41 (1849). See also *Rosario* v. *Rockefeller,* 410 U.S. 752, 761 (1973). The state's interest in this regard includes the qualification of its own officeholders. *Perkins* v. *Smith,* 370 F Supp. 134 (D. Md. 1974), aff'd —— U.S. ——, 96 S.Ct. 2616 (1976) (jurors); *Boyd* v. *Thayer,* 143 U.S. 135, 161 (1892) (Governor); *Foley* v. *Connelie,* 419 F. Supp. 889 (S.D.N.Y.), appeal docketed —— U.S. ——, 45 U.S.L.W. 3449 (Jan. 4, 1977) (police). Compare Rabinovitch brief, pp. 24-25; Mauclet brief, pp. 24-26.

In enchancing the educational opportunities of the potential voter, officeholder and "citizen" leader, L. 1961, c. 389, § 1(a), New York looks to the quality of its own political processes and its competitive position with other states, not merely to generalized benefits the nation as a whole may derive from a more highly educated populace. Since citizenship is a threshold requirement for participation in both state and national political communities, appellees' contention that Education Law § 661(3) reflects, or can only reflect, national concerns must be rejected.* Rabinovitch brief, pp. 24-25; Mauclet brief, pp. 24-26. New York advances its own interests in the manner just described under the statute. Moreover, the state is not required to exclude consideration of an individual's willingness to become a citizen in designating recipients of gifts of state funds. See *Mathews* v. *Diaz, supra* at 78-79, enumerating federal constitutional and statutory distinctions between citizens and aliens and statutory distinctions among aliens. It is surely not required to confine its

* New York requires citizenship of the Governor and Lieutenant Governor (N.Y. Const. Art 4, § 2), members of the legislature (N.Y. Const. Art 3, § 7), public officers (Public Officers Law § 3), voters (N.Y. Const. Art. 2, § 1), police [Executive Law § 215 (3)] and trial and grand jurors [Judiciary Law §§ 504(1), 531(3), 596(1), 609(1), 662(1), 684(1)].

interests to expanding its population and obtaining increased fedral grants-in-aid. Mauclet brief, *ibid.* As Congress and the President may establish qualification requirements for the federal career service and use those requirements to induce participation in the national political community, *Hampton* v. *Mow Sun Wong, supra* (at 104, 105), so the state legislature and the Governor may provide enhanced educational opportunities for present and future state citizens and induce membership in the state's political community. Rabinovitch brief, *Ibid.;* Mauclet brief, pp. 25-26. The contention that New York's pursuit of these goals falls outside the political community doctrine described in *Sugarman* v. *Dougall, supra,* is irrelevant. Rabinovitch brief, pp. 22-24. Although appellants believe that the interests reflected by the student aid programs are so related and thus provide one basis for excepting § 661(3) from strict scrutiny, Appellants' main brief, pp. 18-22 and discussion, p. 5 *ante,* the use of the term "political community" does not of itself enhance or diminish the legitimacy and substantiality of any state interest. It merely provides a convenient designation for a group of interests which may be examined free from any alleged doctrinal connection.

Appellee Rabinovitch misapprehends the state's concern about an alien's willingness to become a citizen and the difficulties he faces as a paroled refugee, identifying these characteristics with the "special public interest" doctrine formerly invoked to justify excluding aliens from public resources on the ground that access to such resources was a privilege, not a right. Rabinovitch brief, p. 17. As this Court made plain in *Diaz,* the selection of certain aliens for benefits on the basis of their ties to the United States is an appropriate exercise of governmental power. 426 U.S. at 80, 83. The "principled reasoning," *Diaz, supra* at 82, offered by appellants in support of Education Law § 661(3) shows that the criteria adopted by the statute reflect specific ties to the state that advance its

interests in the student aid program. Appellants' main brief, pp. 19-20, 22-23, 24-25. Appellants do not contend that access to the student aid program is a privilege to be granted or denied in the state's absolute discretion, and no aspect of the "special public interest" doctrine is involved.

That Education Law § 661(3) designates certain alien students as the beneficiaries of gifts of state funds, necessarily excluding others, does not foreclose the excluded aliens from access to higher education and does not discriminate against them. Appellants' main brief, p. 21. Compare Rabinovitch brief, pp. 15-16, 30-32; Mauclet brief, pp. 28-29, 36. The student aid programs regulated by § 661(3) enhance an individual's opportunity for higher education. They do not create or deny such opportunity.

TAP awards are intended to make "some [financial] provision" for students who seek higher education and "the amount of money available for each student is not great measured by the present cost of college education." Memorandum of the State Education Department in support of L. 1961, c. 389, McKinney's Laws of 1961, pp. 1963-64. See discussion Appellants' main brief, pp. 14-15. Regents scholarships are currently limited to $250 annually. Education Law § 670(b). The state budget for direct student aid for fiscal 1976-77 is $216.3 million.* In contrast, the direct aid budget for institutions offering higher education is $1 billion 274 million for fiscal 1976-77.** This

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* The direct student aid categories are as follows: TAP ($184.2 million); Regents scholarships and fellowships ($23.8 million); State University Awards ($1.9 million); and interest and defaults on student loans ($6.4 million). Reference to State University Awards was inadvertently omitted from the 1975-76 figures previously provided. The amount is included in the interest and default category. Appellants' main brief, p. 8, first footnote.

** The direct institutional aid categories are as follows: SUNY operations ($636.7 million); state aid to CUNY and affiliated com-

(footnote continued on following page)

aid subsidizes the tuition cost of citizens and aliens [except aliens on student visas, 8 U.S.C. § 1101(a)(15)(F) and foreign diplomats, embassy personnel and their families, 8 U.S.C. § 1101(a)(15)(A),(G)] on like terms.*

As the above comparisons demonstrate, the beneficiary of student aid receives a limited financial "bonus" by operation of § 661(3). In receiving that bonus he does not burden the non-recipient's access to higher education. A candidate's merit is examined in the same manner regardless of whether he is a recipient or non-recipient, and the cost of tuition is same. If a non-recipient is truly needy, he may obtain assistance from other public programs, see e.g. Mauclet brief, pp. 25-26 n. 46 listing some federal programs, from the private sector in the form of loans or independent scholarship funds, or he may work. See *August* v. *Bronstein*, 369 F. Supp. (S.D.N.Y.) (three-judge court), *aff'd* 417 U.S. 901 (1974), sustaining civil service preference credits for state veterans even though use of such credits can delay or foreclose the appointment of equally qualified, non-preferred candidates; *Spatt* v. *New York*, 361 F. Supp. 1048, 1053 (three-judge court), aff'd 414 U.S. 1058 (1973), in-state limitation on use of Regents scholarships not a penalty upon otherwise qualified eligibles who wish to attend college out-of-state; *C.D.R. Enterprises* v. *Board of Education*, 412 F. Supp. 1164, 1176 (E.D.N.Y. 1976) (three-judge court, *Platt*, D.J., dissenting), aff'd —— U.S. ——, 45 U.S.L.W. 3455 (Jan. 11, 1977), stating, *inter alia*, that "[f]ailure to grant a benefit [herein, a gift] is not identical . . . with imposing a burden."

(footnote continued from preceding page)

munity colleges ($192.9 million); aid to community colleges sponsored by local jurisdictions ($93.9 million); aid to non-sectarian, independent schools ($62.7 million); and capitation awards to medical and dental schools ($16.1 million). Amounts for debt service and capital construction are omitted.

* New York residence is required for reduced tuition at public colleges and universities. There is no durational residence requirement.

Appellees put aside the distinctions between alien recipients of student aid under § 661(3) and alien non-recipients, Appellants' main brief, pp. 19, 22-25, noting that non-recipients may live in New York as long, or longer, than recipients and that both groups pay federal and state taxes. Rabinovitch brief, pp. 17, 26; Mauclet brief, pp. 28-29. Neither circumstance affects the validity of § 661(3). The permanent resident alien who refuses naturalization cannot become a full participant in community life no matter how long he resides in New York.* The paroled refugee receives aid to ease his resettlement in New York, a circumstance not shared by the long-term alien resident.

The fact that alien non-recipients pay taxes does not afford them a right to participate in the student aid program or identify them with recipients in any relevant way.** The taxpayer is not entitled to a direct or proportionate benefit for his payment, *Kelly* v. *Pittsburgh*, 104 U.S. 78 (1881); *American Commuters Association, Inc.* v. *Levitt*, 279 F. Supp. 40 (S.D.N.Y. 1967), *aff'd*, 405 F.2d 1148, 1152-53 (2nd Cir. 1969), sustaining exclusion of taxpaying commuters from New York Regents scholarships and reduced and free tuition at state and city schools among other programs; *Morton Salt Co.* v. *City of South Hutchison*, 159 F.2d 897, 900-901 (10th Cir. 1947). To the extent that the tax payer is entitled to any return for his payment, he receives it in the form of protective services, e.g. military, police, fire. *American Commuters Association, Inc.*, v. *Levitt, supra.**

* Appellee Rabinovitch has been in New York 13 years (A.68), appellee Mauclet, 8 years (A. 49).

** Aliens who are not diplomats pay excise and property taxes. They are also obligated to pay federal and state income taxes assuming appropriate income levels. It is apparent that appellees Rabinovitch and Mauclet have paid excise taxes, see e.g. *Sugarman* v. *Dougall, supra* at 658-59 (*Rehnquist*, J. dissenting), as have aliens here on student visas whom appellees believe can be properly excluded from student aid. Mauclet brief, pp. 2, 32. There is no allegation that either appellee ever paid any other tax. Indeed, appellee Mauclet's claim that he should receive the maximum $600 TAP award (A.50, Mauclet brief, p. 2) means that his net income plus certain exempt income [Education Law § 663(1)] does not exceed $2,000 annually. Education Law § 667(3)(b).

Education Law § 661(3) is not imprecise because it fails to guarantee that the aided individual will accept the responsibilities of citizenship or even that they will remain in New York. Compare, Rabinovitch brief, pp. 25, 28; Mauclet, pp. 27-28. It is not imprecise because it does not guarantee that the paroled refuge will not be confronted by other problems which will make his resettlement in New York difficult. Compare Rabinovitch brief, p. 27. Strict scrutiny does not require a guarantee of the achievement of any state interest. A classification need only be "necessary" to, i.e. have an established nexus with, the accomplishment of a substantial state interest. *In re Griffiths*, 413 U.S. 717, 722 (1973). No demonstration that the classification has, or will, succeed in obtaining the desired result is required. Indeed, no federal or state program could withstand such scrutiny. Moreover, as appellee Mauclet concedes (brief, p. 28), the application of such a test to § 661(3) "would raise serious constitutional questions" under the First and Fourteenth Amendments. As this Court has observed, strict scrutiny does not "secretly require the impossible." *Dunn* v. *Blumstein*, 405 U.S. 330, 360 (1972).

* Permanent resident aliens are eligible for the draft when the relevant statutes are in force, 50 App. §§ 453, 456(a)(1), but may obtain exemptions pursuant to treaty or by changing their status to non-immigrant. 8 U.S.C. § 1257(a).

C.

Education Law § 661(3) does not conflict with any paramount federal policy regarding aliens or with any federal statute.*

State laws which affect aliens are not *per se* pre-empted by the federal constitutional power over immigration and naturalization, whether latent or exercised. U.S. Const., Art. 1, § 8, cl. 4. *De Canas* v. *Bica*, 424 U.S. 351, 355 (1976).** Nor does the enactment of the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*, provides a basis for finding that states are precluded from enacting laws in aid of higher education which may have a limited effect on some aliens. *Id.* at 356-63. The comprehensiveness of the Immigration and Nationality Act with respect to the regulation of immigration and naturalization does not draw in gifts in aid of higher education as "'plainly

* The district court did not decide this issue (A. 96-102), and it should not be considered by this Court. The issue is properly directed to a single district judge with an appeal as of right to a Court of Appeals. *Hagans* v. *Lavine*, 415 U.S. 528, 543-47 (1974); *Rosado* v. *Wyman*, 397 U.S. 397, 403 (1970). It could then come before this Court only on petition for a writ of certiorari. 8 U.S.C. § 1254. In addition, decisions below would illuminate a point raised by appellee Rabinovitch that § 661(3) conflicts with federal regulations governing the Guaranteed Student Loan Program which provides partial reimbursement for the state program. Rabinovitch brief, p. 35; Appellants' main brief, pp. 16-17. Appellee contended below that the use of the term persons in the United States "for other than a temporary purpose . . . [who] inten[d] to become permanent resident[s] thereof" in 45 C.F.R. § 177.2(a) (1976) required his inclusion in the state loan program to the extent that it was federally subsidized. Appellants have never included permanent residents who have refused to declare their intention to become citizens, viewing the eligibility requirements in the federal regulations as alternatives that may be combined or not as the state chose. Their view has never been opposed by the federal Office of Education (A. 82).

** There is also no *per se* pre-emption under the federal foreign relations power. U.S. Const. Art. 1, § 8, cl. 3, Art. 2, § 2, ch. 2. *Zschernig* v. *Miller*, 389 U.S. 429 (1968); *Clark* v. *Allen*, 331 U.S. 503 (1947).

within . . . [that] central aim of federal regulation' " any more than it draws in California's limitation on the employment of illegal aliens. *Id.* at 359 quoting *San Diego Unions* v. *Garmon*, 359 U.S. 236, 244 (1959). The several provisions of the Act cited by appellees show that this is in fact the case. Education Law § 661(3) is not directed to filtering out subversive aliens, examining their loyalties or to limiting their right to reside permanently in the United States and in New York. Compare Rabinovitch brief, pp. 32-33. Nor does it consider or affect immigration preferences which favor reuniting families or skilled workers. Compare Mauclet brief, pp. 31-32. Although federal law requires that most aliens wait five years until they can become naturalized and places no outer limit on a petition for naturalization, it also allows a resident alien to declare his intent to become a citizen whenever he chooses to do so. 8 U.S.C. § 1445(f). Accordingly, the fact that an alien may choose to declare his intent early in order to come within § 661(3) or for any other reason does not oppose federal law.

In light of these considerations, appellees' pre-emption argument can only be sustained if § 661(3) " 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' " in enacting the Immigration and Nationality Act. *DeCanas* v. *Bica, supra* at 363 quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941) and *Florida Avocado Growers* v. *Paul*, 373 U.S. 132, 141 (1963). In this context, the Court must determine whether the state legislation under review discriminates against lawfully admitted aliens by imposing "additional burdens not contemplated by Congress." *DeCanas* v. *Bica, supra* at 358 n. 6. *Takahashi* v. *Fish & Game Commission, supra* at 419. No such "additional burdens" are imposed by § 661(3). To the contrary, the distinctions drawn by § 661 (3) do not burden alien status as such and have in fact been

contemplated by Congress. Although no longer part of the naturalization process, Congress has carried forward the declarant provision of the Immigration and Nationality Act. 8 U.S.C. § 1445(f). It has so acted with evident awareness of the numerous federal and state programs which utilize declarant status in determining eligibility and with at least tacit approval of the use of that criterion. See *Mathews* v. *Diaz, supra* at 78 n. 12. Moreover, § 661(3) simply withholds a gift, or limited financial incentive, from some aliens. The excluded alien is no more burdened as a result than the examination candidate who cannot obtain veteran's preference credits or the taxpayer who cannot gain access to the programs his taxes support. See discussion pp. 8-9 *ante* and cases cited. His circumstance is not comparable to the alien who cannot obtain the necessities of life if he becomes indigent, *Graham* v. *Richardson, supra,* or who is barred from "the entire field of industry with the exception of enterprises that are relatively very small." *Truax* v. *Raich,* 239 U.S. 33, 40 (1915).

Reliance on 42 U.S.C. § 1981 is inappropriate. Compare Rabinovitch brief, p. 29. Access to state grants is not a matter of "security of persons and property" within the meaning of the statute. *Heim* v. *McCall,* 239 U.S. 175, 193-94 (1915), construing identical language in a treaty with Italy and sustaining exclusion of aliens from public works; *Patsone* v. *Pennsylvania,* 232 U.S. 138, 145 (1914), construing same language and sustaining prohibition on aliens hunting wild game.

CONCLUSION

For the foregoing reasons and those set forth in Appellants' main brief, the judgment of the District Court should be reversed and Education Law § 661 (3)(a), (b) and (c) declared valid under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

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Respectfully submitted,

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